No. 89-970

In The

# Supreme Court of the United States

October Term, 1989

**FIRST COMICS, INC.,**

*Petitioner,*

vs.

**WORLD COLOR PRESS, INC.,**

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## QUESTIONS PRESENTED FOR REVIEW

Like its competitors, First Comics, Inc. (which publishes comic books) delivered to World Color Press, Inc. (which manufactured the physical books) the contents of the books, in the form of plate-ready "color separations" including text and artwork. World Color manufactured the physical containers for those contents—36-page, 4-color comic books, *physically identical* as between First and its competitors—and "drop-shipped" the finished product directly to First's (and its competitors') distributor-customers. World Color charged First as much as *90% more* than its competitors for those physically identical books.

The questions presented are:—

1. Did the Court of Appeals err in holding that as a matter of law the physical comic books produced by World Color were not "commodities" but "services" for Robinson-Patman Act purposes; and
2. Did the Court of Appeals err in holding that as a matter of law the physically identical comic books (the "*containers*") World Color produced for First and its competitors were not of "like grade and quality" for Robinson-Patman Act purposes solely because the *contents* differed;—

where the necessary result of those holdings is to exempt outright the entire printing and graphics production industry, and also other manufacturers of copyrighted articles, from Robinson-Patman Act coverage?

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Petitioner First Comics, Inc. respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on September 19, 1989.

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[1] In conformity with Rules 20.1(b) and 28.1, petitioner states that it is not a publicly held company and has no parents or subsidiaries and that defendant World Color Press, Inc. is wholly owned by PACE Industries, Inc., a non-publicly-held company. (Another defendant, Marvel Comics Group, was dismissed by agreement in April 1987, *R.* 240-41, and is not involved here.)

## OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, *App.* 1-20, has not yet been officially reported.

The four opinions of the District Court concerning the questions presented (all of which *rejected* the view espoused by the Court of Appeals)—one by Magistrate Sussman on October 9, 1984; one by District Judge Bua on December 10, 1984; and two by District Judge Duff on September 18, 1987 and October 28, 1987—are unreported. They are reproduced at *App.* 24-34, *App.* 21-23, *App.* 35-41, and *App.* 44-49, respectively.

## JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Seventh Circuit was entered (see Rule 20.4) on September 19, 1989. This Petition is filed within 90 days of that date. This Court's jurisdiction rests upon 28 U.S.C. Secs. 1254(1) and 2101(c).

## STATUTES INVOLVED

The Robinson-Patman Act, 15 U.S.C. Sec. 13, and Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, are set forth at *App.* 51 and *App.* 53 respectively. Pertinent portions of the Copyright Act, 17 U.S.C. Secs. 106, 109, 202, and 301(d), are set forth at *App.* 55 and following.

## STATEMENT OF THE CASE

**Background.** Plaintiff First Comics, Inc. ("FC") is a small Chicago-based publisher of comic books and "graphic novels." Before FC began publishing (in late 1982), FC discussed the mechanics of, and prices for, manufacturing its comic books with defendant World Color Press, Inc. ("WCP"), the largest comic book manufacturer in the United States (and the only one offering "letterpress" facilities—important to a small start-up enterprise like FC, because letterpress printing is less costly than the "offset" method.) *App.* 1-2; *Tr.* 265, 450-59, 464.

WCP promised FC that WCP's prices to FC would be the same as WCP's prices to FC's far larger competitors (*e.g.*, the giant Marvel Comics Group). But in January 1984, FC learned that WCP had actually been charging FC as much as 90% (nearly *double*) what WCP charged its other comic book customers. For example, WCP charged FC over 46% more than FC's competitors for *identical* shipping "pallets." And WCP charged FC an *average*, over the 1982-1984 period, of *63% more* than others simply for the books—so identical and fungible, from WCP's standpoint, that WCP often produced competitors' books *on the same presses* and *at the same time* as FC's books. *App.* 2; *Tr.* 1206-07, 1218-19, 1317; *P.Exs.* 16, 16A, 93, 101-03.

Throughout the entire 1982-1984 period of the parties' dealings, the *lowest* per-book price WCP charged FC was higher than the *highest* price WCP charged Marvel or FC's other favored competitors. *Tr.* 1207, 1317; *P.Exs.* 101-03. WCP's overcharges alone ate up more than 10% of FC's *gross* (not net) income from comic book sales through-

out the 1982-1984 period (during which FC operated, overall, at a loss).[2]

WCP offered no "cost justification" defense of its discriminatory overcharges to FC.

When FC learned of WCP's discriminatory overcharges, FC demanded a price rollback for the future and an adjustment for past discrimination. WCP refused. *Tr.* 721-28. FC sued under the Robinson-Patman Act, 15 U.S.C. Sec. 13, as well as bringing State-law claims. The basis for Federal jurisdiction in the court of first instance (the District Court) was 28 U.S.C. Secs. 1331 and 1337, FC having pleaded a substantial Federal question under the Robinson-Patman Act and Section 4 of the Clayton Act, 15 U.S.C. Sec. 15. *App.* 10 n.7.

**The Manufacturing Process.** The issues presented here, and the Court of Appeals' abrupt overturning of the repeated holdings of two District Judges and a Magistrate over a five-year period, focus on how comic books (or for that matter almost any graphic or other manufacturings from prior design) are physically produced. As the Court of Appeals observed, the parties are not significantly at odds as to how that is done. *App.* 5.

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[2] See *D.Exs.* 220, 229. The parties agreed below that WCP (which was FC's only source of physical comic books during the parties' dealings) produced some 3.75 million comic books for FC. FC sold the books to distributors—to the "direct market" rather than the consignment-based "newsstand market"—for 40% of the books' retail cover price. *Tr.* 278-79. With a $1 retail cover price, that left 40 cents per book *gross* for FC, or an aggregate of $1.5 million *gross* income. This helps explain why comic books are risky propositions for new entrants. During the 1982-1984 period at issue, at least 10 companies other than FC tried to enter the market as regular monthly publishers of standard 36-page 4-color comics—and *failed*. Only FC and one other survived. *Tr.* 1001.

FC publishes comic books. FC begins with creative personnel who develop the story line, dialogue, and graphics (or drawings) for each comic book. When all of that is complete, FC sends the result to a "color separating" company, which separates the original multicolor artwork into four separate-color printing "screens" and provides FC with negatives (commonly referred to as "color separations") of each screen. When a complete set of color separations has been assembled for a given comic book, it is analogous to the fully edited manuscript of a book (or, FC believes, to the template for a pair of designer blue jeans, or a Rolex watch, or any other such article which is manufactured from another's design). *App.* 27-28, 31-32.

At this point FC still had no physical comic book. To arrive at the comic-book end product, FC delivered its color separations to WCP, which then manufactured the actual printed comic books containing the story and graphics—a completely finished product, which WCP sold to FC and directly "drop-shipped" to FC's customers. FC did not supply WCP with any ink, paper, or other tangible component of the finished comic books. WCP supplied all of the physical materials, and produced the resulting standard-form product: 36-page 4-color comic books *physically identical* to those WCP manufactured for FC's competitors. (FC provided only the color separations, which WCP returned to FC.) WCP did not bill FC separately for any labor costs. Rather, WCP simply billed FC for the *physical product*—the printed comic books. See *App.* 31-32, 37.

Thus before WCP began there were no comic books. When WCP finished, the printed comic books WCP manufactured for FC—*identical*, apart from their contents, to those WCP manufactured for FC's competitors—were ready for sale or use without any further action by FC. The books were then shipped by WCP directly to FC's customers. *App.* 32.

Even WCP saw itself as "manufacturing" a "product." WCP's standard-form contract (*P.Ex.* 11) is cast in terms of producing "goods" (not "services"); see, *e.g.*, its par. 16 (granting a lien) and par. 20 (providing that if the buyer defaults, WCP may "sell or dispose of any copies of the work . . . on such terms as it [WCP] may determine"). See also that document's par. 13 (speaking of "title and risk of loss" in Uniform Commercial Code sale-of-*goods* terms); *Id.*, par. 17 (addressing claims for defective "goods"). Just as WCP's form contract calls for "*manufacturing* specifications" and lists WCP's "*manufacturing* facilities" (including the Sparta, Illinois facility where WCP produced FC's comic books), so in correspondence with FC, WCP itself from time to time referred to what it does as "*manufacturing*" a "*completed product.*" *E.g., P.Exs.* 13, 61, 65, 75.

**The District Court Rulings.** Quite early in this litigation, WCP moved to dismiss under *F.R.Civ.P.* Rule 12(b)(6) (or for summary judgment on) FC's Robinson-Patman claims. Though WCP conceded that comic books—tangible, end-product articles of trade—are generally "commodities," WCP nonetheless argued that its acknowledged price discrimination fell outside the Robinson-Patman ambit because, WCP said, it only provided a "service" to FC.

Magistrate Sussman, to whom WCP's motion had been referred for a report and recommendation, disagreed (*App.* 28-32):

> "It is really quite clear that comic books, in and of themselves, are commodities under the Robinson-Patman Act. . . . However, the defendants see the situation of a 'printer,' such as World Color, printing, constructing and then passing the finished comic books to the publisher as a different sort of exchange. They contend

there is no sale of commodities, but rather a service is being rendered in the printing and creating of the comic books . . . .

"Where the dominant nature of the transaction is to provide a service, and the passage of any goods is merely 'incidental' to the performance of the service, the transaction has been held to not constitute the sale of a commodity. [Citations omitted.]. . . .

". . . However, in the instant case, the goods created . . . are not a mere incidence of the service. The physical, finished comic books are the whole *point* of the performance of the printing. . . .

". . . FCI did not supply World Color with any ink, paper, or other tangible components of the finished comic books. . . . Also, World Color did not bill FCI separately for any labor costs. Rather, it simply billed FCI for the *product*. . . . Thus, before World Color began there were *no* comic books. When it finished, the printed comic books it produced were wholly complete, . . . and were typically shipped directly to FCI customers. . . .

". . . World Color exchanges the comic books with the publisher for a price. These transactions constitute the sale of commodities because the dominant nature of the transactions is the exchange of comic books. . . ."

The Magistrate also rejected WCP's argument that WCP must be selling a "service" because (given FC's copyright) WCP could not itself sell the comic books (*App.* 32-33):

"World Color's standard printing contract provides that '(t)itle . . . to the finished work shall pass to Publisher upon delivery by Printer. . .' The passage of title is the essential element of a 'sale.' . . . [T]he publisher has the proprietary

copyright interests in the creative ideas represented in the comic books. But this does not mean that World Color as a 'printer' cannot 'own' and properly pass title to the physical comic books themselves. World Color [argues] that as a 'printer' it has no proprietary rights to the copyrighted stories, characters and created ideas embodied in the comic books. However, . . . World Color manufactures finished comic books which until delivery and transfer of title belong to World Color and not the publisher. The publisher has no . . . right to delivery and to possession, in the comic books until there is payment. This is distinguishable from ownership of the *copyright* embodied in those magazines. [Citations omitted.]"

WCP appealed to District Judge Bua, who (though unwilling at that stage to finally decide the issue) generally agreed with the Magistrate's analysis and specifically rejected WCP's "copyright" argument. *App.* 21-23. After the case was later transferred to District Judge Duff, WCP again raised its "copyright" argument, which Judge Duff alike rejected (*App.* 36-37):

"World's first argument is deceptively simple but totally erroneous. Relying on section 106(3) of the Copyright Act, 17 U.S.C. Sec. 106(3), . . . World claims that it could not have sold the goods in question because it did not have title to them. Yet nowhere does World assert that any sale illegal under the Copyright Act is *ipso facto* not a sale for purposes of the antitrust laws. . . . [T]he Copyright Act specifically provides that it does not limit remedies available under any other federal statute. *See* 17 U.S.C. Sec. 301(d).

"Moreover, World underestimates the relevance of 17 U.S.C. Sec. 202, which distinguishes

> the ownership of a copyright from the ownership of the material object in which the copyrighted work is embodied. . . ."

District Judge Duff also rejected WCP's argument that because the physical comic books (otherwise physically identical in every respect) had different *contents*, which WCP did not provide and which made no difference whatever to WCP's manufacturing, they themselves—the *containers*—were not "of like grade and quality" (*App.* 37):

> ". . . World does not suggest that a different author or character increases the production cost of the comic book. World provided First and others with 32 four-color interior page letterpress comic books with 4-color covers, all of the same size and paper stock. World does not argue that First requested bigger or more pages or a different kind of paper. Accordingly, [World's] citations to cases involving goods manufactured according to producer specifications are irrelevant. [Citations omitted.]
>
> ". . . World states that the relevant inquiry is whether consumers perceive the goods as comparable. In this case, the consumers are comic book publishers like First, not children buying comic books at newsstands. . . ."

Ultimately District Judge Duff granted FC's motion for directed findings in *FC's* favor on both the "like grade and quality" issue and the "commodities versus services" issue. *App.* 44-48.

All of these rulings were overturned by the Court of Appeals.

## REASONS FOR GRANTING THE WRIT

This case falls squarely within the primary, longstanding, and direct purpose of the Robinson-Patman Act: To prevent "secondary-line" discrimination by sellers such as WCP, who give "larger buyers" like FC's competitors "discriminatory preferences over smaller ones" like FC. *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12 (1976).

Yet in this case the Court of Appeals effectively gutted the Act, excising entire industries from the Act's scope at the stroke of a poorly reasoned pen. Its resolution of the issues presented here conflicts sharply with decisions in other Circuits, with Federal Trade Commission rulings, and, on one issue, with decisions of this Court.

In some circles it is fashionable to decry Robinson-Patman as poorly drawn or outmoded. But that is *not* an excuse for "improving" or truncating the Act by judicial fiat. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). The Court of Appeals' contrary approach here should be corrected before it wreaks further mischief.

### I.

### THE COURT OF APPEALS' MISTAKEN HOLDING THAT THE COMIC BOOKS AT ISSUE ARE NOT "COMMODITIES" CONFLICTS WITH DECISIONS IN OTHER CIRCUITS AND SEVERELY DISTORTS THE ROBINSON-PATMAN ACT BY EXCLUDING ENTIRE INDUSTRIES FROM THE STATUTE'S REACH.

In this case, the Court of Appeals suggested that distinguishing a "commodity" (which is subject to the Robinson-Patman Act) from a "service" (which is not) is a difficult philosophical conundrum. *App.* 7:

> "No doubt one could dissect any service arrangement and find results akin to commodities. Likewise, one could label each level of any manufacturing process as a service with incidental tangible results."

Ordinarily, however, the distinction is quite clear-cut. A "commodity" is simply "*an article of trade or commerce,* especially a product as distinguished from a service." *Baum v. Investors Diversified Services, Inc.*, 409 F.2d 872, 875 (7th Cir. 1969) (quoting the dictionary). On the other hand, a "service" is "useful labor *that does not produce a tangible commodity*—usu. used in pl. (charge for professional services)." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (7th Ed. 1963) at 167, 793; see *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 389 (8th Cir. 1974). Common sense says that a "tangible commodity," an "article of trade or commerce" is at issue here: physical comic books. But the Court of Appeals stood common sense on its head, insisting that the comic books at issue (*wholly complete end products* when they get to WCP's loading dock) are at that point merely "printing services"—even though when WCP ships them, *with no change at all,* to FC and its customers they are admittedly "commodities."

### A. Comic Books Are "Commodities." The Court of Appeals' Attempt Artificially To Transmute Them Into "Services" Distorts The Robinson-Patman Act And Conflicts With The Decisions.

It is clear that comic books, like other printed materials, are generally subject to the Robinson-Patman Act—that they are "goods" (or "commodities") rather than "services." See *App.* 5. (See also page 6 *supra* concerning WCP's own standard printing contract.) Certainly the decisions have left no doubt. See, *e.g.*, *Reid v. Harper &*

*Bros.*, 235 F.2d 420 (2d Cir.), *cert. denied*, 352 U.S. 952 (1956) (books); *In the Matter of Archie Comic Publications*, 61 F.T.C. 100 (1962) (comic books); *In the Matter of American News Co.*, 58 F.T.C. 10 (1961) (books, magazines, and comic books); *In the Matter of National Comics Publications, Inc.*, 57 F.T.C. 61 (1959) (comic books); *In the Matter of Christmas Club*, 25 F.T.C. 1116 (1937) (printed account books, passbooks, and advertising literature used by banking institutions).

Yet here the Court of Appeals transmuted the same comic books everyone acknowledges are "commodities" the moment they *leave* WCP's loading dock (shipped by WCP itself direct to FC's customers), into "services" while they *wait* at that same loading dock. Surely no amount of alchemy can work such a transformation, seriously damaging the proper scope of Robinson-Patman over a broad area.

Common sense alone teaches that no such extraordinary transmutation occurs upon the mere passage of title at WCP's loading dock. To the contrary, the comic books WCP produces are "commodities," pure and simple—a reality which cannot be sidestepped by specious distinctions between a "printer"and a "publisher" (as the lower courts understood, *App.* 33, but the Court of Appeals did not, *App.* 9). Both the Federal Trade Commission and the courts (other than the Court of Appeals here) have made that clear. Defendants who both print and publish have been held subject to the Robinson-Patman Act. *E.g.*, *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 389 n.11 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974). And defendants who do not publish at all, but merely *print to a customer's specifications*, also have been held subject to the Act. *In the Matter of Christmas Club*, 25 F.T.C. 1116 (1937), is on point. In that case Christmas

Club supplied printed passbooks, account books, and advertising literature (25 F.T.C. at 1123), *to the specifications of individual commercial bank customers*. Christmas Club printed some of its materials itself; others were produced by independent contractors who shipped directly to the customer banks. 25 F.T.C. at 1125. In short, Christmas Club (precisely like WCP here) was engaged in *producing and selling printed material made to the specifications of its customers*. Yet the Federal Trade Commission had no difficulty in holding that activity to be within the Robinson-Patman Act. 25 F.T.C. at 1127.

The Court of Appeals' contrary ruling here cannot be reconciled with decisions such as those just discussed. Nor has FC found support anywhere else for the Court of Appeals' labored "service-one-minute-but-commodity-the-next" reasoning in this case. A "commodity" is quite simply ". . . a product *as distinguished from* a service." *Baum v. Investors Diversified Services, Inc.*, 409 F.2d 872, 875 (7th Cir. 1969). The thing sold (here, comic books) is necessarily one or the other. To say that it flip-flops between the two distorts the statutory concept.

**B. The Court of Appeals' Attempt To Hinge The Nature Of The Comic Books On The Skills Involved In Making Them Is Contrary To The Decisions And Would Severely Truncate The Statute.**

To be sure, WCP argued below (and the Court of Appeals' notion, *App.* 8, that WCP only sells "the letterpress method and process" amounts to the same view) that because WCP provides "printing services" and "skills," during the production process, the tangible, complete, saleable comic books it produces are really "services" themselves. But that argument unavoidably fails—and *must* fail, if the Robinson-Patman Act is to have any

application at all. Sellers of tangible goods like WCP cannot escape the Robinson-Patman Act by arguing that their tangible end products are "merely" materials and labor or embody the "services" or "skills" of numerous people. See, for example, *Morning Pioneer, Inc. v. Bismarck Tribune Co., supra*, 493 F.2d at 389, as to the printing and production of a newspaper:

> "The term 'commodity' is not defined in the [Robinson-Patman] Act, but is generally thought to include only tangible items of commerce and not services. We recognize that the production of a newspaper [like a comic book] requires and incorporates the services of a great number of people, but the fact remains that when finally published, the paper [or comic book] takes on a tangible form and it is bought and sold in the market place. As such, it is predominantly a tangible good and, thus, a 'commodity' subject to the Act."

Surely that is obvious—and in direct conflict with the Court of Appeals' approach here. One buys *comic books* (or newspapers)—not printing "services" with no tangible outcome. The object is to get the *tangible finished product*, not to watch a printing press at work. Here the products (comic books) are tangible objects with their own, self-contained function—"commodities." By contrast, "services" outside the Act do *not* end with a tangible, self-contained object. That is shown by the very cases the Court of Appeals itself cited.[3] *May Dept. Store v. Graphic Process*

[3] See *App.* 3-6, 8. Those cases typically involved either *no* product *at all*, or a product which is merely a tool or step toward providing an intangible service which is the real purpose of the transaction. See, *e.g.*, *Baum v. Investors Diversified Services, Inc.*, 409 F.2d 872 (7th Cir. 1969) (commissions on mutual funds shares); *Col-*

(Footnote continued on following page)

*Co.*, 637 F.2d 1211, 1213 (9th Cir. 1980), makes this clear. The *May* defendant produced *not* the final product, *not* anything usable in itself, but only the *means by which* the end result (newspaper advertising) could be accomplished. In fact, the *May* court's description shows pointedly that what the defendant did there is *precisely* analogous to the "color separations" in this case—useless objects in themselves; useful only as *steps toward* the desired end result. (*Even so*, the *May* court held that the defendant had *not* established Robinson-Patman immunity, or "services." Thus the Court of Appeals' contrary approach here cannot even be reconciled with its own "lodestone" citation—let alone the other cases discussed.)

In the "services" cases cited by the Court of Appeals, the plaintiff sought to squeeze a *service* such as repair labor, or construction labor, or billing, into the Act by pointing to the *incidental* transfer of some tangible object.

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3 *continued*

*umbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961) (television broadcast time); *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527 (7th Cir. 1974) (title insurance); *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186 (5th Cir. 1978) (airplane engine repair services); *Tri-State Broadcasting Co. v. United Press Int'l, Inc.*, 369 F.2d 268 (5th Cir. 1966) (news information *via* teletype); *General Shale Prods. Corp. v. Struck Constr. Co.*, 132 F.2d 425 (6th Cir. 1942) (brick incident to the "entire construction of extensive housing facilities"; case was "*not* a case . . . claim[ing] . . . discrimination in selling brick at a lower price than [plaintiff's 'Speedbrik']," and "[i]t [was] *not* claimed that [plaintiff] was a competitor with the sellers of brick"). Even *SCM Corp. v. Xerox Corp.*, 394 F.Supp. 384, 385-86 (D. Conn. 1975), discussed at some length by the Court of Appeals, involved "copied images . . . considered separately from the paper on which they appear"—surely equivalent to the comic book *contents* in this case, not to the physical books WCP manufactured—because in *SCM Corp.* the paper itself was not sold (and the copying equipment itself was only leased).

See page 14 note 3 *supra*. For example, in *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527 (7th Cir. 1974), title insurance was in issue. Obviously the buyer's goal was not just a piece of paper labelled "policy," but rather the *service* (title searches, "the rendering of an opinion" thereon, and insurance *coverage*) of which the paper was merely the "incidental" evidence. 527 F.2d at 531. Here, however, the comic books WCP produced were obviously *not* "incidental" to something else. Rather, *they* were, *in themselves*, the goal of FC's entire transaction with WCP. And plainly they are "commodities." In the Court of Appeals' "services" cases, the object was not to produce and sell a tangible, functional end product; rather, the only "tangible" was *incidental* to the real purpose of the transaction. Here the "tangible" was the entire object of the exercise; and to call it a "service" arbitrarily truncates Robinson-Patman's statutory scheme and distorts its aim.

Thus, for example, *Advanced Office Systems, Inc. v. Accounting Systems Co., Inc.*, 442 F.Supp. 418, 423 (D. S.C. 1977), cited by the court, concerned a billing, collection, and mailing service. *Advanced* held that sending physical bills to third parties did not convert the service into a "commodity":

> "[T]he issue to be addressed is not the process by which [a thing] is made or the 'customized' nature of the item, but rather what its dominant function is . . . . The bills used in a billing service have no self-contained function. They are useless unless sent to an account debtor, but once sent they effectuate many collections. Such is the dominant function of the bills and billing service—by effectuating collection, the defendants render a service."

Simply contrast that case with this one. In *Advanced*, the physical bills were not the "end," but a *means* to the

"end" of a collection *service.* The bills themselves had no "self-contained function." The "tangible" bills were thus *incidental to the "service."* Here, by contrast, the comic books *were* the "end." Here it was the *printing* which was a means to that end, which had no "self-contained function," and which was indeed "useless"—*except as a step in producing tangible, end-product comic books.*

Moreover, to avoid that analysis by asserting that the production process involves "special skills," or that FC really bought the "process" rather than its tangible result (as the Court of Appeals did), is to eviscerate Robinson-Patman. *Any* high-quality finished product—be it a newspaper, or a Rolls Royce, or a Swiss watch—involves the "services" and "special skills" of many people. But that *cannot*—without wreaking serious damage on the statute—make the *tangible end product* (the newspaper, or the car, or the watch) anything other than a commodity.

Producing a newspaper involves "graphic arts," "special" reporting (and other) "skills," and "the services of a great number of people." But it is still a tangible end product—and a "commodity." *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, quoted at page 14 *supra*. Producing "[a] specially manufactured T-shirt which is customized and which serves an advertising purpose" no doubt also involves "graphic arts," "special skills," and "services." But it too is a tangible end product; it too "has functional value solely derived from its tangible existence"—and it too is *a "commodity." Advanced Office Systems, supra,* 442 F.Supp. at 423. Why? Because (as those cases teach) the newspaper and the T-shirt are not "incidental"; rather, *they* are the *end product.* It is the graphics and skills and services which are incidental to *their production as tangible goods*—not the other way around. Patently "special skills" or "services of many people" or "using a process"

cannot be the test; that would evoke the absurd result that (*e.g.*) Rolls Royces, Swiss watches, newspapers, and customized T-shirts would not be commodities, which would all but repeal the statute. Rather, the test is whether the dominant purpose of the transaction is to produce a tangible item, which has a self-contained function, useful and saleable in itself—such as, in this case, tangible comic books so immediately saleable that WCP shipped them directly to FC's customers.[4] The Court of Appeals' contrary approach damages and confuses the Robinson-Patman Act and should be corrected.

**C. The Court of Appeals' Inappropriate Injection Of Copyright Questions Into This Case Seriously Distorts The Law And Should Be Corrected.**

Not content with rewriting the normal (and elsewhere prevailing) meaning of "commodities" and "services," the Court of Appeals also resurrected WCP's "copyright-act" argument (see pages 7-9 *supra*) in a way which overlooks the plain language of the Copyright Act and comes perilously close to excluding all copyrighted or trademarked goods from the ambit of Robinson-Patman. The Court of Appeals reasoned, *App.* 8, that:

> "[A]t the printing stage the comic books lack real value to any entity other than First Comics.

[4] The Illinois state court (where WCP and FC are both located, where WCP's sales to FC took place, and whose law WCP's standard contract expressly invokes), in a closely similar case, ruled that a magazine publisher's purchase of magazines from a printer was a sale of "goods"—*not* "services"—for purposes of the analogous Uniform Commercial Code differentiation, because in a case such as this "the primary subject of the contract [is] the tangible printed magazines [or comic books] and not 'printing services.' " *Gross Valentino Printing Co. v. Clarke*, 120 Ill.App.3d 907, 458 N.E.2d 1027, 1030 (1983).

World Color Press cannot sell the finished comic books to any other buyer since First Comics holds the copyright, nor would any of World Color Press' other clients be interested in finished comic books bearing a First Comics story—rather each client wants only the printed version of its own comic book."

Respectfully, such reasoning is not merely specious, but pernicious. In effect, it asserts that: (*i*) the comic books at issue must be a "service," (*ii*) because they "lack real value" as goods to "any entity other than [FC]," since (*iii*) the Copyright Act would bar WCP from selling them to "any other buyer." (Of course the result of that reasoning would be the wholesale *exclusion* of *all* copyrighted products from Robinson-Patman.) Here WCP clearly could—and *did*—sell the comic books it manufactured to FC; and those sales, coupled with WCP's sales of comic books to other publishers such as Marvel at far lower prices, fall squarely *within* Robinson-Patman. And the fact that the publisher "has the . . . copyright . . . in the *creative ideas*" quite plainly "does *not* mean that World Color . . . cannot 'own' and properly pass title to the physical comic books themselves." See *App.* 32-33, 36-37.

Suppose (see *App.* 36) that one pirates a copyrighted design, manufactures the articles, and purveys them to the public. The Copyright Act has been violated. But no one would argue that there had not been "sales" of "goods." Nor would one claim that (for example) a Taiwan company which manufactures patented or trademarked or copyrighted articles (such as designer jeans, or watches, or customized T-shirts, or electronics goods) for an American patent or copyright or trademark holder, does not sell those articles *to the buyer for whom they were made*—even though, by law or contract, the manufacturer may not be free to sell

them to others.[5] And no one could sensibly argue that those goods are not "commodities." See, *e.g.*, *Advanced Office Systems*, *supra*, 442 F.Supp. at 423.

Here, however, the Court of Appeals' curious invocation of copyright concepts not only would resolve all of those factual situations the other way (and greatly diminish the protection Robinson-Patman affords), but also would distort the *Copyright Act* into a sort of *pro tanto* repeal of the anti-price-discrimination provisions of the *Robinson-Patman Act*. Of course the Copyright Act does no such thing. 17 U.S.C. Sec. 301(d) is explicit:

> "Nothing in this title [*i.e.*, the Copyright Act] annuls or limits any rights or remedies under any other Federal statute."

Even with a copyright, 17 U.S.C. Secs. 106 and 109 *expressly permit* sales even to *third parties* where the copyright owner so "authorizes"—for example, by contract. (Of course WCP's own standard contract contains just such an authorization. See page 6 *supra*.) And the Court of Appeals' strained contrary reasoning also overlooked *Platt & Munk Co., Inc. v. Republic Graphics, Inc.*, 315 F.2d 847, 853-55 (2d Cir. 1963), which not only recognized such contractual rights but also held that the third-party sale right exists even *absent* any contract, despite "the copyrighted character of the goods." That decision is directly opposed to the Court of Appeals' reasoning here—not merely on the "sale" point, but also because *Platt & Munk* plainly treated the manufacturer even of

[5] For purposes of this point, there is of course no distinction between the *type* of resale prohibition (*i.e.*, patent, trademark, copyright, or simple contract). See *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 853-55 (2d Cir. 1963), pointedly drawing no such distinction.

*copyrighted* objects as a "*seller*" and the objects themselves not as "services," but as "*goods*."[6]

## II.

## THE COURT OF APPEALS' "LIKE GRADE AND QUALITY" REASONING DISTORTS THE MEANING OF THAT STATUTORY TEST, CANNOT BE RECONCILED WITH THE CASES, AND ALL BUT REPEALS THE STATUTE AS TO A LARGE CLASS OF GOODS.

In addition to damaging the Robinson-Patman Act by holding that an acknowledged "commodity" transmutes into a "service" if it involves "multiplying images" (or, presumably, any other "design" or "copyright" or "graphic" element), the Court of Appeals wrought further damage by asserting that the *physically identical* comic books WCP manufactured for FC and FC's competitors—*identical* in size, number of pages, paper stock, binding, and every other manufacturing characteristic, to the point where FC's and competitors' books were run *on the same presses at the same time*—were nevertheless not "of like grade and quality." *App.* 8-9 at n.6. Apparently the court's view was that since the *story line* was different as between different books (an element with which WCP had no concern whatever, though no doubt a reader would), the *physical books* WCP manufactured could never be "of like grade and quality" for Robinson-Patman purposes. *Id.*

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[6] *E.g.*: ". . . an unpaid *manufacturer* of copyrighted *goods*"; ". . . persons who have . . . *purchased* . . . the *goods*"; ". . . the *goods* manufactured for plaintiff"; "the copyrighted *merchandise*"; ". . . the law gives an unpaid *manufacturer* a right to *sell*"; ". . . [plaintiff's] refusal to *pay for* allegedly defective *goods*"; "[defendant], having made what it considers a valid tender of the *goods*, has a claim for the *purchase price*." 315 F.2d at 849, 854, 855.

Respectfully, that makes no sense. The court's reasoning would effectively *repeal* Robinson-Patman for *every* category of identically manufactured goods (for example, red and blue T-shirts, or shower curtains with stripes as opposed to dots, or milk with a "premium" brand name *vs.* some other label) which have some differentiation *irrelevant to their manufacture*, so long as an "ultimate consumer" would prefer one over another.

Put it in terms of this case: A story is an *idea*. Who its writer is *in no sense* affects the physical object in which it is contained. The Court of Appeals' contrary approach would mean that physically identical shower curtains are not "of like grade and quality" because they have different patterns (designed by persons akin, in that regard, to writers or illustrators), *which is not so* (*Joseph A. Kaplan & Sons, Inc.*, 63 F.T.C. 1308, 1347-48 (1963), *mod. on other grounds*, 347 F.2d 785 (D.C.Cir. 1965)); or that physically identical but "customized" T-shirts cannot be subject to Robinson-Patman because they have different words or designs, *which is not so* (*Advanced Office Systems v. Accounting Systems Co.*, 442 F.Supp. 418, 423 (D.S.C. 1977)); or that identical milk products (or blue jeans, or other articles) are not "of like grade and quality" because one has an "author's" or "premium" label and the other does not, *which is not so* (*FTC v. Borden Co.*, 383 U.S. 637, 640-41, 645-46 & n.6 (1966); or that books of differing "subject matter" (words and pictures) are not subject to Robinson-Patman, *which is not so* (*In the Matter of Doubleday & Co., Inc.*, 52 F.T.C. 169, 192-93 (1955)).

What the Court of Appeals did here, in fact, would stultify the entire purpose of the Robinson-Patman Act. That Act seeks to require sellers to charge buyers the *same* price *for making the same thing*—even if (as in

*Borden, supra*) the brand name (connoting "authorship") is different, since that does not have any bearing on *what the seller makes*. Here all agree that WCP's radically different prices to FC and others, were *for making exactly the same thing*: 32 four-color page letterpress comic books with 4 four-color cover pages, all of exactly the same size and paper stock. Plainly the Act was meant precisely to cover that situation. But the Court of Appeals scuttled that statutory purpose by pointing to the differences in *intangible ideas*—story, characters, illustrations—which *had absolutely nothing to do with what WCP made*. The Court of Appeals did not suggest that those differences in *the contents* in any way affected the cost of the *physically identical* books WCP manufactured (the *containers*)—any more than the differing contents of two identical tin cans would allow a tin can maker to charge differently for the cans themselves. See *Bruce's Juices, Inc. v. American Can Co.*, 87 F.Supp. 985, 987, 990-91 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir.), *cert. dism.*, 342 U.S. 875 (1951).

Moreover, the Court of Appeals made matters even worse by framing the issue in terms of "ultimate consumers" (*App.* 8-9 at n.6). On that basis, *no* two issues of even *the same* comic book could ever be "of like grade and quality." "Ultimate consumers" no doubt have differing preferences for different-patterned shower curtains, or different brand names, just as much as for different stories in comic books. But *Kaplan, supra*, this Court's decision in *Borden, supra*, and other decisions such as *In the Matter of General Foods Corp.*, 52 F.T.C. 798, 817, 826 (1956) ("institutional blend" *vs.* "grocery blend" coffee), all teach that this does *not* bear on the *physical* "like grade and quality" of otherwise identical goods—*i.e.*, the physically identical comic books at issue here. Put sim-

ply, as to such goods the Court of Appeals' "ultimate consumer" (or "market acceptance") test was *rejected* by this Court in *FTC v. Borden Co., supra.*[7]

And there is a worse distortion. In this case, *WCP's* "consumers" were *not* the ultimate retail buyers. Rather, *WCP's* consumers were FC and other publishers who bought *only the physical books* (since they themselves supplied the ideas). Even "ultimate consumers" *never* bought what *WCP* sold: the *container alone*, not its contents. One cannot defend price discrimination regarding the *physical container alone*, by arguing that an "ultimate consumer" may pay more for different *contents*. To allow the Court of Appeals' contrary approach to stand would render Robinson-Patman a virtually toothless dog. For on that court's reasoning, *any* differing contents, or even *labels* (be they brand names, or "institutional" versus "grocery" blends, or any other such thing) would at once exempt the *containers*, or other objects on or in which they are included, from Robinson-Patman—even if, as here, the containers are physically identical and their manufacturer has nothing whatever to do with the contents or labels.

Such a sweeping, wholesale excision from the Robinson-Patman Act should not be permitted to stand.

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[7] In *Borden*, the lower court had held—*precisely* as the Court of Appeals reasoned here—that the "like grade and quality" determination should "*not* be based solely on the physical properties of the products," but rather should include "the brand names they bear," their "relative public acceptance," and "all [other] commercially significant distinctions." 383 U.S. at 639-40. That was *wrong*, this Court held. *Id.* at 640-41, 645-46 & n. 6.

## CONCLUSION

For the foregoing reasons, petitioner First Comics, Inc. respectfully requests this Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit; to reverse that court's determination that defendant World Color Press, Inc. and the comic books it manufactures are as a matter of law exempt from the Robinson-Patman Act; and to remand the case to that court for appropriate further proceedings.

Respectfully submitted,

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# APPENDICES

# APPENDIX 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-2731 and 88-2745
FIRST COMICS, INC.,

*Plaintiff-Appellant and Cross-Appellee,*

*v.*

WORLD COLOR PRESS, INC.,

*Defendant-Appellee and Cross-Appellant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1828—**Brian Barnett Duff**, *Judge.*

ARGUED JUNE 12, 1989—DECIDED SEPTEMBER 19, 1989

Before BAUER, CUMMINGS, and FLAUM, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Plaintiff First Comics, Inc. is a small Chicago-based enterprise that began seriously exploring entrance into comic-book publishing in February 1982. By June, First Comics had decided to proceed with plans to publish comic books and began negotiations with defendant World Color Press, Inc., a comic book printer. At this time, World Color Press was allegedly the only

printer to use the letterpress method,[1] a less expensive process of printing comic books. As the largest comic book printer its customers included the largest publishers in the field, notably Marvel Comics Group and DC Comics. During the negotiations with World Color Press, First Comics apparently secured a promise that First Comics would receive the same price and treatment as enjoyed by the larger comic book publishers. Some time in August, First Comics agreed to have its comics printed at World Color Press.

World Color Press failed to live up to its promise to provide the same price and treatment to First Comics as it provided to its larger customers. First Comics, under the impression that the prices it was being charged were the same as the larger publishers that it was competing against, was actually being charged an average of 11.1 cents per copy, or 4.3 cents more per copy than Marvel Comics.[2] First Comics discovered the differing charges in January 1984 and demanded to be recompensed by World Color Press through refund or future credit. World Color Press refused, and in response First Comics switched to another printer, one that used the more expensive offset process since no other letterpress printer could be found.

First Comics then filed this suit, alleging that World Color Press violated the Robinson-Patman Act, 15 U.S.C. § 13(a), and alleging pendent state claims for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121½, § 261, *et seq.*, and common law fraud. The case, originally assigned to Judge Bua, was transferred to Judge Duff, who presided over the nineteen-day jury trial. The jury ultimately found for

[1] First Comics claims that World Color Press is the only printer to use the letterpress method, while Judge Duff, in his memorandum opinion of June 16, 1988, referred to other comic book printers, but did not specify whether these other printers also employed the letterpress method.

[2] These figures are according to First Comics' damage expert.

World Color Press on the Robinson-Patman and Illinois statutory claims, but found for First Comics on the fraud claim and assessed damages in the amount of $407,072. Judge Duff later reduced the damages award by $236,705.

A. Robinson-Patman Act

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it "unlawful for any person . . . to discriminate in price between different purchasers of commodities . . . ." As a jurisdictional matter, the Robinson-Patman Act only protects purchasers from discriminatory pricing of commodities. But what are commodities, and what happens when a challenged pricing scheme involves commodities and non-commodities? Unfortunately, the Act fails to answer these questions.

In *Columbia Broadcasting System v. Amana Refrigeration, Inc.*, 295 F.2d 375, 378 (7th Cir. 1961), certiorari denied, 369 U.S. 812, this Court, borrowing from § 3 of the Clayton Act (15 U.S.C. § 14), defined the term commodities as "goods, wares, merchandise, machinery or supplies." Other courts have similarly tried to separate commodities from intangible goods or services. See, *e.g.*, *Tri-State Broadcasting Co. v. United Press Int'l*, 369 F.2d 268, 270 n.2 (5th Cir. 1966) (distinguishing between tangible and intangible goods; news information); *City of Gainesville v. Florida Power & Light*, 488 F. Supp. 1258, 1281 (S.D. Fla. 1980) (tangible and intangible goods; electricity); see also W. Patman, Complete Guide to the Robinson-Patman Act 33 (1963) (the Act covers pricing for "any movable or tangible thing").[3]

[3] The Federal Trade Commission, however, has argued for an analysis that accounts for the practical effects of the challenged activity in light of the purpose and structure of the Act, "rather than becoming preoccupied with metaphysical considerations about what is or is not a tangible product." *In the Matter of the Times Mirror Co.*, 92 F.T.C. 230, 233 (1978) (which held that newspaper advertising is within the ambit of Robinson-Patman; the case was

(Footnote continued on following page)

Because of the functional overlap, the distinction between goods and services is not always clear. Many transactions are of a hybrid nature, contemplating both goods and services; even the transfer of an intangible or service can rarely be accomplished without the incidental involvement of documents or other tangibles. To distinguish between goods and services the dominant nature of the transaction governs whether the activity is subject to the Act.[4] See Rowe, Price Discrimination Under the Robinson-Patman Act 60-61 (1962) ("price quotations fusing physical elements with *dominant* intangible factors cannot beget price discrimination in commodity sales") (emphasis in original); *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527, 531 (7th Cir. 1974). In *Freeman*, the plaintiffs argued that as purchasers of title insurance, they were primarily interested in the title search report, a physical document, and not the underlying search or insurance. This Court rejected that argument, noting that "the reports, like legal memoranda, are merely the embodiment of that service. Clearly, it is the performance of this service and not the delivery of the physical document which constitutes the dominant nature of the transaction . . . ." *Id.*; *Baum v. Investors Diversified Services,*

[3] *continued*

later settled and dismissed). See also Kinter, Federal Antitrust Law: The Robinson-Patman Act 233 (1983) (discussing *Times Mirror*). But see Rowe, Price Discrimination Under the Robinson-Patman Act 61-62 (1962) (arguing in favor of the Commission's earlier opinion that newspaper advertising is not within Act and citing statutory history limiting Act to goods); Von Kalinowski, 4 Antitrust Laws and Trade Regulation § 24.05 (1988 ed.) (collecting authorities).

[4] The dominant nature examination was first undertaken by the Sixth Circuit in *General Shale Products v. Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942), certiorari denied, 318 U.S. 780. In *Shale*, the Sixth Circuit determined that a construction contract did not include a sale of commodities within the meaning of the Robinson-Patman Act even though the contract listed separately the cost of the bricks and other tangible items to be supplied. See *May Department Store v. Graphic Process Co.*, 637 F.2d 1211, 1215 (9th Cir. 1980).

*Inc.*, 409 F.2d 872, 875 (7th Cir. 1969) (mutual fund shares not commodities); see also *Columbia Broadcasting System v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961), certiorari denied, 369 U.S. 812 (sale of television advertising is a service); *Tri-State Broadcasting Co. v. United Press Int'l*, 369 F.2d 268 (5th Cir. 1966) (news information provided by teletype is a service); *Aviation Specialties, Inc. v. United Technologies, Corp.*, 568 F.2d 1186 (5th Cir. 1978) (discrimination in sale prices for aircraft parts arising from repair contract not actionable because dominant nature of transaction was for repair work); *Ideal Plumbing Co. v. Benco, Inc.*, 382 F. Supp. 1161 (W.D. Ark. 1974), affirmed, 529 F.2d 972 (8th Cir. 1976) (discrimination in the sale price of components used in construction contract not actionable under the Act because dominant nature of contract was for construction service); *Kennedy Theater Ticket Serv. v. Ticketron, Inc.*, 342 F. Supp. 922 (E.D. Pa. 1972) (admission ticket to theater not commodity, but rather incidental to license for admission); *Lubbock Glass & Mirror Co. v. Pittsburgh Plate & Glass Co.*, 313 F. Supp. 1184 (N.D. Tex. 1970) (contract for glazing a service even though glass, doors and windows supplied).

The parties do not dispute that comic books are commodities within the meaning of the Act. See, *e.g.*, *The Morning Pioneer, Inc. v. The Bismarck Tribune Co.*, 493 F.2d 383 (8th Cir. 1984), certiorari denied, 419 U.S. 836 (newspapers are commodities); *Reid v. Harper & Brothers*, 235 F.2d 420 (2d Cir. 1956) (books are commodities); *In the Matter of Doubleday & Co.*, 52 F.T.C. 169 (1955) (books are commodities). And while First Comics and World Color Press agree on the facts of the transaction between them, they dispute the nature of the transaction. Both parties agree that during their relationship First Comics developed an illustrated story and sent it to a company that produces a color separation. The color separation was then sent to World Color Press, which would print the comic books from the separation, supplying the paper, ink, staples and labor. World Color Press then

delivered the comic books on First Comics' behalf to retail vendors. The color separation, as well as the copyright for the comic books, remained the property of First Comics. First Comics claims that by these transactions it purchased finished comic books from World Color Press. In contrast World Color Press argues that it did not sell anything to First Comics, but rather merely performed the service of printing for a fee.

*SCM Corp. v. Xerox Corp.*, 394 F. Supp. 384 (D. Conn. 1975), and *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211 (9th Cir. 1980), addressed issues similar to the one before us, but neither case finally decided the matter. The plaintiff in *SCM* leased a copying machine from Xerox. The lease price was determined by the number of copies made; thus the plaintiff claimed that the dominant nature of the transaction was a sale of copies. The court ultimately determined that the transaction was actually a sale of the copying process, not a commodity, primarily because the plaintiff purchased the paper on which the copies were made independently of the copier. In a footnote, that court virtually predicted our situation here:

> Where the customer acquires both the paper and the images upon it, as when a photographer sends his negatives to be printed, a closer question arises as to whether the customer has purchased the process of enlarging or enlarged prints that could be considered commodities.

394 F. Supp. at 386 n.1.

In *May Dep't Store*, the Ninth Circuit heard an appeal from a grant of summary judgment on a Robinson-Patman claim. The plaintiff in *May Dep't Store* alleged that the defendant discriminated in the pricing of veloxes, a type of printing medium in which original artwork is transformed into a series of dots and then used to reproduce the artwork in newspapers. The court recognized the similarity to the "[*SCM*] trial court's analogy . . . [that] must now be addressed." 637 F.2d at 1211. While the court majority addressed the issue, it unfortunately did not decide

the matter, but rather determined that the question involved issues of fact that should have precluded summary judgment.[5]

The transaction between First Comics and World Color Press included aspects of a sale of both services and commodities. No doubt one could dissect any service arrangement and find tangible results akin to commodities. Likewise, one could label each level of any manufacturing process as a service with incidental tangible results. But, constrained as we are to identify this transaction as either one or the other, we have little difficulty in concluding that the dominant nature of the transaction was one for services. World Color Press is a printer; it is hired to transpose images from one surface to another. First Comics, like any other publisher, purchases the process of printing from a printer like World Color Press.

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[5] The court listed as significant the fact that May did not provide Graphic

> with any tangible ingredients. The intangible ingredient, artwork, is returned to May with a tangible product, a velox. Graphic has not produced any comparison between the cost of the physical components of a velox and the price charged May. There is no evidence that Graphic billed May separately for labor. We find, therefore, that summary judgment was improperly granted. We do not hold, however, that the transactions involved in this dispute were sales of goods. The plaintiff has the burden of proving this element at trial.

637 F.2d at 1216. Although factual findings may clarify the matter, we are unconvinced that the entire issue—whether the transaction was a sale of commodities—properly belongs before a trier of fact. Rather it is for the court to decide if a given transaction is within the meaning of a statutory term. See *Freeman*, 505 F.2d at 531 n.10.

Judge Skopil dissented from the decision to reverse summary judgment, observing that "Graphic does nothing more than transform May's artwork into an almost identical image. The production of a tangible item is only incidental to the service provided by Graphic." *Id.* at 1217.

First Comics argues that because the end result produces comic books, which are of course tangible objects, and the comic books are then transferred to First Comics, the transaction should be characterized as the manufacture and sale of comic books. This argument is not without some persuasion since World Color Press supplies the generic raw materials, *viz.*, the paper, ink and staples, and arguably no commodities exist at the start of the printing process while at the finish thousands of comic books are ready to be sold. But what was First Comics buying? It was not buying the comics themselves—First Comics' artists and authors produce the comics. And it was not merely buying the paper and ink. The tangible items provided by World Color Press, the paper, ink and staples, are uniformly fungible and not subject to significant price differentials among printers. Rather, as First Comics argues in its brief, World Color Press is "the only [printer] using the less costly 'letterpress' method" (Br. 3)—and that is what First Comics was purchasing, the letterpress method and process of transposing and multiplying images. As explained in Rowe, *supra*, at 60-61, price quotations fusing physical elements with dominant intangible factors do not beget price discrimination within the Act.

The singularly most important ingredient, the color separations, were provided by First Comics. Defendant was in essence multiplying what First Comics already produced. Borrowing from *Advanced Office Systems v. Accounting Systems Co.*, 442 F. Supp. 418, 423 (D. S.C. 1977) (preparation of billing statements is a service), at the printing stage the comic books lack real value to any entity other than First Comics. World Color Press cannot sell the finished comic books to any other buyer since First Comics holds the copyright, nor would any of World Color Press' other clients be interested in finished comic books bearing a First Comics story—rather each client wants only the printed version of its own comic book.[6]

[6] This also relates to the Robinson-Patman Act's requirement that the commodities sold be of like grade and quality. Since the fin-

(Footnote continued on following page)

The finished comic books are certainly not insignificant with respect to the process of printing. But the requisite inquiry is to ascertain whether the resulting tangible goods were incidental to a service or the crux of the transaction. Here the comic books were significant, yet they were nonetheless the result of the service of printing. The transaction was for printing even though it involved the purchase of supplies, just as theater tickets are incidental to the intangible right to see a performance, *Kennedy Theater Ticket Serv., supra*, or bricks are incidentally purchased to satisfy a construction contract, *Shale, supra*.

This result does not conflict with earlier decisions holding that newspapers and books are commodities, because in those cases the defendants were the publishers. There the publishers were sued for discriminatory pricing schemes for identical books and identical newspapers sold to different retailers and consumers. The publishers were indeed selling commodities, the predominant nature of the transactions was between the publishers and their customers and involved sales of identical products. Here the transaction was for printing, a service which made possible the production of commodities for future sales by plaintiff. The Robinson-Patman Act was therefore inapplicable.

[6] *continued*

ished First Comics comic books are of no use to any other publisher, it is a tenuous suggestion that printed comic books, such as Marvel and First Comics comic books, are of like grade and quality simply because they are printed to the same specifications. See Kinter, Federal Antitrust Law: Robinson-Patman Act 232-233 (1983) ("it makes sense to focus principally on the *perception of the ultimate consumer* . . . if consumers view the products as dissimilar, and prefer one to the other even if the prices are equal, then Robinson-Patman ought to play no role") (emphasis in original); Vawter, Jurisdiction, Commerce and Exemptions; Sales, Commodities and Like Grade and Quality Requirements, 53 Antitrust L.J. 847, 860 n.31 (1985).

### B. Illinois Consumer Fraud and Deceptive Business Practices Act

#### 1. Consumer Injury Requirement

First Comics also appeals the district court's ruling that consumer injury is an independent element of its pendent state claim brought under the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121½, ¶ 261 *et seq.* The district court originally granted summary judgment to World Color Press due to First Comics' failure to plead consumer injury specifically. The court later reinstated the claim, but still instructed the jury that in order for First Comics to prevail on its claim, it must have proved that World Color Press' pricing had an injurious impact on consumers generally, and not simply on First Comics.

As a federal court hearing a state law claim,[7] the district court and this Court are obliged to follow the decisions of the Illinois Supreme Court, or if that court has yet to offer its opinion on a matter, then the federal courts are to decide the case in the manner the state high court would likely decide it. In the absence of an Illinois Supreme Court decision on the matter, intermediate appellate state court decisions are the guideposts, unless there are other persuasive data that the state supreme court would decide the matter differently. *Peeler v. Village of Kingston Mines*, 862 F.2d 135 (7th Cir. 1988), citing *Hicks v. Feiock*, 108 S. Ct. 1423, 1428-1429 n.3, and *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464-465.

The Illinois Supreme Court has yet to rule whether the Consumer Fraud Act requires proof of public injury or some general effect on consumers broadly in order to recover under the Act, and the intermediate state appellate courts are in some disagreement on the matter, as are the district courts within this Circuit. Indeed only

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[7] Since a substantial federal question was presented by this case and a great many judicial resources have already been expended, jurisdiction is proper under pendent jurisdiction.

recently this Court was faced with the issue in *Graphic Sales, Inc. v. Sperry Univac Div.*, 824 F.2d 576 (7th Cir. 1987), but avoided its resolution because the case was decided on other grounds. This time we cannot avoid the fray.

The Consumer Fraud Act provides that:

> Unfair methods of competition and unfair or deceptive acts or practices, * * * are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

Ill. Rev. Stat. ch. 121½, ¶ 262. The Act authorizes a private right of action by providing:

> Any person who suffers damage as a result of a violation of this Act committed by any other person may bring an action against such person.

Ill. Rev. Stat. ch. 121½, ¶ 270(a). At first blush, the Act seemingly does not require that consumer or public injury need be proved to prevail under the Act. Nonetheless both the state and federal courts have split on the matter, although the balance seems to require such an injury. Compare *Jays Foods, Inc. v. Frito-Lay, Inc.*, 664 F. Supp. 364 (N.D.Ill. 1987) (requiring consumer injury); *Maduff v. Life Ins. Co. of Virginia*, 657 F. Supp. 437 (N.D.Ill. 1987) (requiring consumer injury); *Horsell Graphic Industries v. Valuation Counselors, Inc.*, 639 F. Supp. 1117 (N.D. Ill. 1986) (requiring consumer injury); *Heritage Ins. Co. v. First National Bank of Cicero*, 629 F. Supp. 1412 (N.D. Ill. 1986) (requiring consumer injury); *UNR Industries, Inc. v. Continental Ins. Co.*, 623 F. Supp. 1319 (N.D.Ill. 1985) (requiring consumer injury); *Newman-Green, Inc. v. Alfonzo-Larrain*, 590 F. Supp. 1083 (N.D.Ill. 1984) (requiring consumer injury); *Feldstein v. Guinan*, 148 Ill. App. 3d 610 (1st Dist. 1986) (requiring consumer injury); *McCarter v. State Farm Mutual Automobile Ins.*, 130 Ill.

App. 3d 97 (3d Dist. 1985) (requiring consumer injury); *Frahm v. Urkovich*, 113 Ill. App. 3d 580 (1st Dist. 1983) (requiring consumer injury); with *Hometown Savings & Loan Ass'n v. Mosely Securities Corp.*, 703 F. Supp. 723 (N.D.Ill. 1988) (not requiring consumer injury); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 647 F. Supp. 1026 (N.D.Ill. 1986) (not requiring consumer injury); *Duncavage v. Allen*, 147 Ill. App. 3d 88 (1st Dist. 1986) (not requiring consumer injury); *Tague v. Molitor Motor Co.*, 139 Ill. App. 3d 313 (5th Dist. 1985) (not requiring consumer injury); *M & W Gear Co. v. AW Dynamometer, Inc.*, 97 Ill. App. 3d 904 (4th Dist. 1981) (not requiring consumer injury); *Beard v. Gress*, 90 Ill. App. 3d 622 (4th Dist. 1980) (not requiring consumer injury).

Besides having the weight of the cases on its side, that line of reasoning requiring a showing of consumer injury is the more persuasive and therefore most likely to be adopted by the Illinois Supreme Court. Without such a limitation, the Act would not simply be extremely far-reaching but would likely supplant many common law breach of contract and fraud cases, something the Illinois legislature surely did not intend. See *Maduff*, 657 F. Supp. at 440; *Exchange National Bank v. Farm Bureau Life Ins.*, 108 Ill. App. 3d 212 (3d Dist. 1982).

Moreover a complete reading of the Act supports the conclusion that its aim was to protect consumers. Paragraph 262, which broadly forbids unfair methods and deceptive practices, directs "consideration . . . to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act," 15 U.S.C. § 45, its federal counterpart. Under Section 5(a) of the Federal Trade Commission Act, a charge alleging an unfair or deceptive practice must contemplate protection of the public. See *Spiegel, Inc. v. Federal Trade Comm'n*, 494 F.2d 59, 62 (7th Cir. 1974), certiorari denied, 419 U.S. 896, citing *Federal Trade Comm'n v. Klesner*, 280 U.S. 19, 27. The succeeding paragraphs of the Consumer Fraud Act essentially compare a laundry list of specific instances in which the Act would

apply—all of which necessarily implicate consumer concerns, *e.g.*, ¶ 262A (pyramid sales schemes); ¶ 262B (consumer sales contracts); ¶ 262C (consumer credit); ¶ 262D (installment sales); ¶ 262J (advertising); ¶ 262J.1 (coupons); ¶ 262 (offers of prizes); ¶ 262Q (home improvements). And though some courts have expressed an unwillingness to construe the consumer injury requirement absent explicit legislative dictate, see *Haroco*, 647 F. Supp. at 1026; *Hometown Savings & Loan*, 703 F. Supp. at 727, citing *Sedima, S.P.R.L. v. Imrex*, 473 U.S. 479, the Act must not be read in a vacuum. While the judiciary should not abuse its authority by correcting a legislative mistake, *Sedima, supra*, it should not interpret legislation in such a microscopic fashion as to blur the context.

As noted, the Illinois Supreme Court has not squarely addressed this issue, but has indicated that the reach of the Act is limited to conduct which deceives or exploits consumers. See *Scott v. Ass'n for Childbirth at Home*, 88 Ill.2d 279, 285 (1981) (Act applies to advertising and sale of educational and training services because "purchasers of educational services may be in as much need of protection against unfair or deceptive practices in their advertising and sale as are purchasers of any other service"); *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 328 (1977) (rejected medical school applicants cannot sue under the Act because they are not consumers).[8] These pronouncements indicate an intention on the part of the Illinois Supreme Court to look beyond the effect of the immediate scheme on the putative victim to determine

[8] Of those cases that did not require consumer injury, most have either involved consumer plaintiffs or conduct from which consumer injury could readily be inferred. *E.g.*, *Haroco, supra* (plaintiffs were commercial borrowers and alleged deceptive activity involved broad segment of bank's activities); *M & W Gear, supra* (consumer injury easily inferred in false advertising suit between competitors); *Duncavage, supra* (tenant was held consumer under Consumer Fraud Act); *Tague, supra* (plaintiff was consumer complaining about misconduct in sale of car); see also *Jays Foods*, 664 F. Supp. at 369; *Newman-Green*, 590 F. Supp. at 1087.

whether a class of consumers was affected. Consequently, consistent with the Act, it was incumbent upon First Comics to show that World Color Press' "misconduct injured consumers generally." *Jays Foods*, 664 F. Supp. at 369.

2. Failure to Show Consumer Injury

Under the Illinois Act First Comics had the burden of proving that consumers generally were injured in some way by World Color Press' misconduct. Consumer injury can take two forms: direct injury to the consumers or indirect through stifled competition. First Comics claims that World Color Press' pricing scheme stifled competition by promoting retail price disparities between First Comics comic books and those of the favored publishers, primarily Marvel Comics Group, DC Comics and Archie, another comic book publisher.

First Comics argues, and the jury accepted, that World Color Press charged higher prices for printing services to those publishers in competition with its favored publishers. This does not necessarily mean that competition was stifled in such a way as to injure consumers. See, *e.g., American Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963), certiorari denied, 377 U.S. 954 (price discrimination does not *per se* constitute antitrust violation; plaintiff still must show a lessened ability to compete). First Comics must demonstrate that consumers were affected by the price disparity; it failed to persuade the jury on this issue at trial. The "plaintiffs are not entitled to judgment notwithstanding the verdict . . . unless no rational jury could have brought back a verdict for the defendants." *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 678 (7th Cir. 1985), certiorari denied, 475 U.S. 1129 (citations omitted), a more rigorous standard than merely persuading this Court that a different verdict should have been reached.

The jury's decision that World Color Press' misconduct did not injure consumers generally is not without rational

basis. There was ample evidence for the jury to reach that decision. For example, there was evidence before the jury that First Comics set its retail price before even receiving the price quotations from World Color Press. Moreover, the difference between First Comics' one dollar cover price and those of the favored publishers was much higher then the overcharge incurred by First Comics. And when First Comics did receive printing cost reductions, it did not pass these production cost savings on to the consumers, but rather pocketed the savings. This detracts from its argument that lower production costs would have allowed it to compete with the favored publishers' cover price. There was no evidence that First Comics lost sales or customers because of its higher cover price, and in fact one witness testified that the market is made up of collectors unlikely to be deterred by the price differential alleged by First Comics. Finally, there was evidence concerning other comic book publishers—both successful and not, favored and unfavored—which suggested that the price differential did not stifle competition, or result in higher cover prices or consumer injury. In light of the evidence available to the jury, there was a rational basis for its conclusion that competition was not stifled, nor were consumers generally injured.

### C. Damages

First Comics prevailed at trial on its common law fraud claim and was awarded $407,072 in damages by the jury. This award included $236,705 in consequential damages. The consequential damages arose following the discovery of the fraud, when First Comics began using another printer. According to First Comics, which did not have a contract with defendant, the contracts between World Color Press and the favored publishers included a provision which required either side to tender one-year notice for non-renewal of the contract. First Comics argues that this notice provision amounted to a one-year price protection benefit enjoyed by the favored publishers. First Comics contends that if it had received equal treatment

as promised by the defendant, it too would have been subject to this provision, which would have meant not only lower charges during the fraudulent period, but also would have guaranteed those lower prices during the one-year period following the fraud. Absent such notice, First Comics contends that its injuries continued accruing for a year even after it secured another printer. Thus the consequential damages figure represents the price differential between what First Comics paid to the later printer over the subsequent year and the price First Comics would have paid to World Color Press had there been no fraud. After the trial Judge Duff, however, reduced First Comics' award by that amount, and First Comics appeals his decision.

Plaintiff argues that fraud damages can accumulate even after the discovery of fraud, citing *Thor Power Tool Co. v. Weintraub*, 791 F.2d 579, 585 (7th Cir. 1986), and *Four "S" Alliance v. American Nat'l Bank*, 104 Ill. App. 3d 636 (1st Dist. 1982). It is true that injuries caused by fraud are not neatly halted by discovery of the fraud. Nevertheless, First Comics was required to show that its claimed consequential damages grew out of the fraud.

While jury awards will not be disturbed unless lacking a rational basis, with all inferences drawn in favor of the non-moving party, a reduction of the damages award was justified here. There was no basis to justify the jury's award of consequential damages.

World Color Press promised First Comics that it would render treatment equal to that extended to the favored publishers. This was obviously untrue, as evidenced by the higher prices charged for printing services which now comprise First Comics' direct damages award. And First Comics argues that if it had equal treatment it would have had one-year price protection. But equal treatment does not mean identical treatment. The favored publishers were longstanding customers with longstanding contracts and whose business, by First Comics' own estimation, comprised well over half of World Color Press' business.

The contracts between World Color Press and the favored publishers were not simply one-year price protection provisions solely for the publishers' benefit, but rather guaranteed to each party at least one-year notice of non-renewal. The provision was for World Color Press' benefit as much as the publishers.

In contrast First Comics had yet to publish a single book when the promise of equal treatment was extended. Obviously, neither World Color Press nor First Comics expected a long-term contract at that time. In fact, First Comics never signed a contract with World Color Press; instead, it paid for printing by the job. Thus there was nothing to hold First Comics to World Color Press, nor World Color Press to First Comics. While First Comics no doubt relied on the promise of equal treatment, any sort of price protection to plaintiff would have been more favorable than the treatment extended to the favored publishers because First Comics would enjoy the so-called one-year price protection without the obligation to continue with World Color Press for at least a year. The only rational scope for the term equal treatment would be the price for each job, since that is the context in which the promise was made and upon which plaintiff relied.[9]

World Color Press also excepts to the final damage award. At the time of the lawsuit, First Comics had been billed but refused to pay $99,624 in printing charges and freight costs, which prompted World Color Press to counterclaim for this amount. At trial First Comics' damage expert calculated its total damage figure under the mistaken impression that these charges had been paid. World Color Press requested that Judge Duff instruct the jury

[9] First Comics contends, without rebuttal by World Color Press, that Judge Duff included within the $236,705 reduction a claim of $5,370 that the jury had already rejected (Br. 18 n.12). If true, that $5,370 was not a component of the original damages award as assessed by the jury and should not have been offset. On remand a determination should be made as to whether the $236,705 reduction did indeed include this already rejected claim.

to deduct this amount from whatever damages amount it might later award First Comics. Judge Duff declined this instruction as well as World Color Press' subsequent motion for judgment on the counterclaim. This was error.

First Comics' direct damages consisted of the fraudulent prices it actually paid less the prices it should have paid absent the fraud. The final damages figure cannot include that sum which was merely billed but not paid, because First Comics certainly has not suffered this loss. The proper resolution is either to exclude the unpaid charges from First Comics' damages determination or to award judgment on World Color Press' counterclaim. Consequently, First Comics is only entitled to those losses it actually incurred.

## D. Conclusion

First Comics is not entitled to judgment on its Robinson-Patman Act claim. As a matter of law, First Comics paid for printing services, not commodities, and therefore the Robinson-Patman Act had no applicability. As for the Illinois Consumer Fraud and Deceptive Business Practices Act, we agree with the district court that the Illinois Supreme Court would likely require that some sort of public or consumer injury be demonstrated in order to recover under that Act. First Comics failed to meet that standard.

Finally, with respect to the damages awarded by the jury on First Comics' common law fraud claim, Judge Duff correctly reduced the award by the amount of higher charges incurred by First Comics in the year following the fraud.[10] There was no rational basis to conclude that First Comics was entitled to a one-year period of price protection. The damage award should have been reduced further by the amount of outstanding charges which plaintiff never paid.

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[10] But see note 9 *supra*.

Accordingly, the judgment is affirmed except as to amount of damages. As to that feature the case is remanded for recalculation consistent with this opinion.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 19, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

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FIRST COMICS, INC.,

Plaintiff-Appellant

No. 88-2731 vs.
88-2745

WORLD COLOR PRESS, INC.,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1828—**Brian Barnett Duff**, *Judge*.

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This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED AND REMANDED, in accordance with the opinion of this Court filed this date. Costs to be borne by World Color Press.

# APPENDIX 2

[Dated December 10, 1984]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FIRST COMICS, INC.,

Plaintiff,

v.

WORLD COLOR PRESS, INC., and MARVEL COMICS GROUP, a Division of Cadence Industries Corp.,

Defendants.

No. 84 C 1828
Honorable Nicholas J. Bua, Presiding

## MEMORANDUM AND ORDER

The Court upholds in part and rejects in part defendants' objections to the Magistrate's Report and Recommendation. Therefore, while defendants' motion for summary judgment is denied, the court expresses no opinion on the matter of the existence of a sale of a commodity under the Robinson-Patman Act.

## I. DISCUSSION

The Magistrate's Report and Recommendation, issued October 9, 1984, denied defendants' motion for summary judgment. It also held that, as a matter of law, there exists a sale of a commodity under the Robinson-Patman Act. In effect, the Magistrate granted partial summary

judgment for the plaintiff on the issue of the existence of a sale of a commodity. The Court believes that it was improper for the Magistrate to so hold on the issue of the sale of a commodity.

Defendants argue correctly that the Magistrate's holding deprived them of a reading of the facts in the light most favorable to them. The Magistrate began correctly by reading the facts in the light most favorable to the plaintiff in the context of defendants' motion for summary judgment. However, it was incorrect for the Magistrate to continue a factual reading favorable to the plaintiff when he held for the plaintiff on the issue of the sale of a commodity. This issue involves genuine issues of material fact and therefore a finding for the plaintiff at this time is equal to summary judgment on the issue in plaintiff's favor. This result is improper here. Therefore, defendants' objections to the Magistrate's affirmative finding on this issue is upheld and that finding is stricken from the Report.

Defendants' objection is overruled regarding the Magistrate's analysis of the "dominant nature" test in determining whether a commodity exists. The case of *May Department Store v. Graphic Process Company*, 637 F.2d 1211 (9th Cir. 1980) is dispositive of this issue here. The facts in that case are analogous to the facts here. In *May Department Store*, the court outlined several issues of fact under the "dominant nature" test which indicated that summary judgment was inappropriate: (1) costs between intangible service and tangible goods provided; (2) supplying of ingredients; and (3) breakdown of costs on billing invoices. *Id.* at 1215.

In the present case, the Court finds all three of the above facts to be controverted. In addition, the Court finds that the degree of skill involved in World Color's printing and manufacture of the comic books is a question of fact which bears on whether the dominant nature of the comic book printing and manufacture is a service or a commodity.

Finally, defendants' objection regarding the absence of a sale since World Color could not be the owner of the comic books under the federal copyright laws, is overruled. The Court agrees with the distinction in the Magistrate's Report between ownership rights in comic books printed and manufactured by World Color and ownership rights of the copyright embodied in the comic books. (Pages 8-9 of the Report). Therefore, the Court finds that a genuine issue of material fact exists regarding the existence of a sale of the comic books between World Color and First Comics.

## II. CONCLUSION

The Court accepts Magistrate Sussman's recommendations as modified and incorporates his report into this order making it a part hereof as Appendix A, and orders that the motion for summary judgment of defendants World Color Press and Marvel Comics is denied.

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA
Nicholas J. Bua, Judge

Dated: December 10, 1984

# APPENDIX 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FIRST COMICS, INC.,

Plaintiff,

No. 84 C 1828 v.

WORLD COLOR PRESS, INC., and MARVEL COMICS GROUP, a Division of Cadence Industries Corp.,

Defendants.

## REPORT AND RECOMMENDATION OF MAGISTRATE CARL B. SUSSMAN

TO THE HONORABLE NICHOLAS J. BUA, one of the Judges of the United States District Court for the Northern District of Illinois.

This is an action for violations of the Robinson-Patman Act, 15 U.S.C. Section 13(a) (1982), the Sherman Act, 15 U.S.C. Section 2, and the Illinois Deceptive Trade Practices Act, 121½ Ill. Rev. Stat. Sections 262, 270(a) and 312. The defendants have moved to dismiss the complaint for failure to state a claim, or in the alternative, for summary judgment. Under Rule 12(b) of the Federal Rules of Civil Procedure, if on a motion to dismiss for failure to state a claim, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed.R.Civ.P. 12(b). As the parties have presented affidavits for this motion, the court will consider the motion as one for summary judgment.

## SUMMARY JUDGMENT PROCEDURE

Summary judgment under Rule 56 is an extreme remedy which should not be granted unless the movant is entitled to judgment beyond all doubt. *City National Bank of Fort Smith, Arkansas v. Vanderboom,* 422 F.2d 221, 223 (8th Cir. 1970), *cert. denied,* 399 U.S. 905 (1970); *Homan Manufacturing Company v. Long,* 242 F.2d 645, 653 (7th Cir. 1957). It should be entered only when ". . . the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Fitzsimmons v. Best,* 528 F.2d 692, 694 (7th Cir. 1976). The burden is on the moving party to show that there is no genuine issue of material fact. *Rose v. Bridgeport Brass Company,* 487 F.2d 804, 808 (7th Cir. 1973). However, mere conclusory assertions are not sufficient to support a motion for summary judgment. *Patterson v. General Motors Corporation,* 631 F.2d 476, 482 (7th Cir. 1980), *cert. denied,* 451 U.S. 914 (1981).

The basic mission of the summary judgment procedure is to allow the court to pierce the pleadings and assess the proof in order to see whether there is a genuine need for a trial. *Gauck v. Meleski,* 346 F.2d 433, 436 (5th Cir. 1965). In performing its task, the court must draw inferences from underlying facts contained in such materials as affidavits, exhibits and depositions, in the light most favorable to the non-movant. *Poller v. Columbia Broadcasting System,* 368 U.S. 464 (1962); *Fitzsimmons, supra,* 528 F.2d at 694; *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.,* 356 F.2d 442, 446-47 (7th Cir. 1966), *cert. denied,* 384 U.S. 950 (1966). The non-movant's allegations must be taken as true to the extent that they are consistent with the evidence before the court. *Goodman v. Mead, Johnson & Company,* 534 F.2d 566 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). The court must resolve all doubts as to the existence of a genuine issue

of material fact against the moving party. *Technograph, supra,* 356 F.2d at 447.

## STATEMENT OF THE CASE IN LIGHT MOST FAVORABLE TO THE NON-MOVANT

Plaintiff First Comics, Inc. (FCI), a Delaware corporation with its principal place of business in Illinois, filed a four count complaint against World Color Press, Inc. (World Color), a Delaware corporation with its principal place of business in Illinois, and Marvel Comics Group (Marvel), also a Delaware corporation with its principal place of business in New York. FCI is a comic book publisher, as is Marvel. World Color contends that it is a "printer" of comic books. FCI alleges that World Color printed and "sold" comic books for Marvel at a discriminatory price; a price lower than that for "sales" to FCI. Complaint Paragraphs 12-47. FCI contends that that transaction was a violation of the Robinson-Patman Act, as well as the Sherman Act and Illinois Deceptive Trade Practices Act.

The defendants have moved for summary judgment because the complaint does not state a claim under the Robinson-Patman Act. The defendants argue certain jurisdictional elements necessary under the Act are lacking. The defendants' motion centers on the Robinson-Patman claims because defendants contend the entire complaint depends on those claims. FCI has alleged that the Robinson-Patman violation is the basis of a Sherman Act violation. FCI's Count II under the Sherman Act alleges that Marvel perpetrated a marketing strategy to induce comic book distributors to forebear committing their resources to Marvel's competitors' comic books. This effort by Marvel was to enhance its monopoly in the comic book market. FCI alleges that Marvel could only do this in conjunction with the discriminatory pricing arrangement Marvel had with World Color. Complaint paragraph 117. Defendants argue if there is no Robinson-Patman violation because of jurisdictional insufficiency, there can be

no Sherman violation. Finally, defendants contend if these federal statutory claims are not present, the pendent state trade practices claims must fail for lack of subject matter jurisdiction. Thus, as it seems to be central to the continued vitality of this cause, the Robinson-Patman Act must be considered.

ROBINSON-PATMAN ACT

15 U.S.C. Section 13(a) (1982) provides that:

> (i)t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different *purchasers of commodities* of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such *commodities are sold* for use, consumption, or resale within the United States, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . .

(Emphasis added). The defendants contend to be a Section 13(a) violation, the discriminatory dealing must encompass a *sale* of a *commodity*. They argue that World Color provides only a service, that is, the *printing* of comic books, and thus there can be no sale of a commodity in its dealing with Marvel. The unique situation presented in the business transaction involved here merits explanation. A comic book publisher, such as Marvel or FCI, creates a story and the illustrations for a comic book. The publisher creates color separations, that is, the graphic arts plate-ready films from which the actual books are printed. It would seem clear that the publisher "owns" these "negatives" so to speak, as well as the copyright interest in the creative material on them. The publisher then takes its "negatives" to an enterprise such as World Color who actually prints and "makes up" the comic books. The "printer" supplies the paper and ink. Thus, when "printer" and publisher begin their transaction, there really are no "commodities" to speak of in exist-

ence—only creative ideas. When the "printer" is through, commodities have been "created"—the finished comic book. The question is whether this activity constitutes a sale of commodities or simple performance of a service.

## SALE OF A COMMODITY

The Seventh Circuit has stated that commodities under Section 13(a) are "goods, wares, merchandise, machinery and supplies . . .". *Columbia Broadcasting System v. Amana Refrigeration*, 295 F.2d 375, 378 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962). It is really quite clear that comic books, in and of themselves, are commodities under the Robinson-Patman Act. It has been held that one who sells and distributes magazines and comic books in interstate commerce deals in a commodity. *See generally, Reid v. Harper & Brothers*, 235 F.2d 420 (2d Cir. 1956), *cert. denied*, 352 U.S. 952 (1956); *In the Matter of Doubleday and Company, Inc.*, 52 F.T.C. 169 (1955). *See also In the Matter of Archie Comic Publications, Inc.*, 61 F.T.C. 100 (1962) (comic books); *In the Matter of American News Company*, 58 F.T.C. 10 (1961) (books, magazines, and comic books); *In the Matter of National Comics Publications, Inc.*, 57 F.T.C. 69 (1960) (comic books). The parties seem to be in agreement that comic books are commodities *in general*. World Color's Memorandum at 10; Plaintiff's Response at 1. It would appear that the defendants would not disagree that when a publisher sells its comic books to distributors and consumers, the sale of commodities is taking place. However, the defendants see the situation of a "printer," such as World Color, printing, constructing and then passing the finished comic books to the publisher as a different sort of exchange. They contend there is no sale of commodities, but rather a service is being rendered in the printing and creating of the comic books.

It appears to this court that the exchange involved here is a hybrid transaction of performance of a service and the passing of a commodity. FCI does not deny that

World Color indeed prints comic books. This is a service. But with the performance of that service, commodities are involved. The commodities (the comic books) are the entire goal of the rendering of the service (the printing).

The courts have often been confronted with situations that are the combination of an exchange of goods and performance of a service. The courts look to the "dominant nature" of the transaction to determine whether it is essentially the performance of a service. If so, there is no Robinson-Patman violation. *Freeman v. Chicago Title & Trust Company*, 505 F.2d 527, 531 (7th Cir. 1974) (title insurance, though does pass to buyer a tangible insurance document, is primarily rendering of a service); *Morning Pioneer, Inc. v. Bismarck Tribune Company*, 493 F.2d 383, 389 n. 11 (8th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974) (though publishing a newspaper does involve service, it is primarily selling a commodity); *Tri-State Broadcasting Company v. United Press International, Inc.*, 369 F.2d 268, 270 (5th Cir. 1966) (news information bureau provides a service, though tangible items are exchanged). *See also May Department Store v. Graphic Process Company*, 637 F.2d 1211, 1215 (9th Cir. 1980).

Where the dominant nature of the transaction is to provide a service, and the passage of any goods is merely "incidental" to the performance of the service, the transaction has been held to not constitute the sale of a commodity. *Tri-State Broadcasting Company*, 369 F.2d at 270; *General Shale Products Corp. v. Struck Construction Company*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943) (construction contract, even with separately stated prices for brick and labor, was predominantly for service); *General Glass Company v. Globe Glass and Trim Company*, 1978-2 Trade Cases (CCH) Paragraph 62,231 (N.D. Ill. 1978) (sale of window replacement glass was incidental to installation thereof in repair agreement and did not constitute a transaction in a commodity); *SCM Corp. v. Xerox Corp.*, 1975-2 Trade Cases (CCH) Paragraph 60,477 (D. Conn. 1975) (photocopy company renders a service and not the sale of a commodity).

The defendants would have this court apply the "dominant nature" test in the instant case to determine the "printing" of comic books is primarily a service with the comic books constituting mere "incidentals" of the service rendered. The defendants suggest one case in particular as determinative here. In *Advance Office Systems, Inc. v. Accounting Systems Company, Inc.*, 442 F.Supp. 418 (D. S.C. 1977), it was held that a company that printed and prepared billing statements for other companies' accounts receivable performed a service and did not sell a commodity. The court described the defendant's operations as follows:

> The defendant's sale of prepared billings of accounts receivable is performed generally in (this) manner. . . . An agent of the defendant goes to the customer's place of business and photographs the customer's accounts receivable ledger cards. The exposed film is then sent by the defendant's agent to the defendant's place of business . . . . There, utilizing the photographed copies of the customer's account cards, the defendant prints statements, puts them in envelopes, and mails them to the customer's debtors.

*Id.* at 419 n.3. The court held that, despite the fact that the process resulted in and was intended to create the transfer of tangible items, that is, the printed billing statements, the plaintiff's complaint failed to state a Robinson-Patman claim. *Id.* at 421. The court concluded "the (d)efendant is not selling a commodity. Defendant is selling a service, and such service is not a commodity within the meaning of the Robinson-Patman Act." *Id.* at 424.

The court sees an essential difference between the instant case and *Advance Office Systems* and some of the other "combination" cases cited where a service was found to be the dominant nature of the transaction. In *Advance Office Systems*, the "goods" created, the billing statements, were of no value or meaning except in the context of the *service* provided, that is, the billing of

customers' accounts receivable. Similarly, in *Freeman, supra,* a title insurance document has no importance outside of the service rendered, the providing of title insurance protection. *Freeman,* 505 F.2d at 531. However, in the instant case, the goods created because of the service, that is, the comic books from the printing, are not a mere incidence of the service. The physical, finished comic books are the whole *point* of the performance of the printing. Further, the comic books have value and meaning in and of themselves *outside* the context of the printing service. This is unlike the billing statements of *Advance Office Systems* or the title insurance document of *Freeman.*

The court is encouraged by other facts apparent from FCI's interpretation on the nature of the comic book "printing" transactions. Supported by affidavit, FCI contends, that as a publisher, it begins with creative personnel who develop the story line, dialogue, and graphics (or drawings) for each comic book. When the story, dialogue, and graphics have been completed in book form, FCI sends the result to a "color separating" company, which separates the original multicolor artwork into four separate-color printing "screens" and provides FCI with negatives or color separations of each screen. When a complete set of color separations has been assembled for a given comic book, it is analogous to the fully edited manuscript of a book. Obadiah Aff. Paragraph 5. FCI delivers its completed color separations to World Color, which uses them to produce the actual printed comic books, the completely finished product that World Color "sold" to FCI and "drop-shipped" to FCI's customers. Obadiah Aff. Paragraphs 4-5. FCI did not supply World Color with any ink, paper, or other tangible components of the finished comic books. World Color supplied those physical materials. FCI provided only the color separations, which World Color returned to FCI after it produced the printed comic book. Obadiah Aff. Paragraph 5. Also, World Color did not bill FCI separately for any labor costs. Rather, it simply billed FCI for the *product*—

the *printed comic books produced.* Obadiah Aff. Paragraph 6. Thus, before World Color began there were *no* comic books. When it finished, the printed comic books it produced were wholly complete, ready for sale or use without *any* further action by FCI, and were typically shipped directly to FCI customers. Obadiah Aff. Paragraph 7.

The plaintiff's argument that a sale of commodities is involved here seems sound. Comic books are clearly a commodity under the Robinson-Patman Act. It seems clear that what World Color is giving to publishers such as Marvel after the printing and assembling process are complete and finished comic books—a commodity. World Color exchanges the comic books with the publisher for a price. These transactions constitute the sale of commodities because the dominant nature of the transactions is the exchange of comic books. There is no doubt that some element of service is involved in the printing of the comic books, but the primary purpose of the dealing is to pass on the comic books themselves. These comic books have value and purpose outside of the context of the service performed.

Also supportive of the conclusion that these transactions are sales of commodities is the fact that World Color's standard printing contract provides that "(t)itle . . . to the finished work shall pass to Publisher upon delivery by Printer . . .". Obadiah Aff., Exhibit B paragraph 14. The passage of title is the essential element of a "sale." Further, the court does not argue that the publisher has the proprietary copyright interests in the creative ideas represented in the comic books. But this does not mean that World Color as a "printer" cannot "own" and properly pass title to the physical comic books themselves. World Color makes some detailed arguments that there can be no *sale* of a commodity here because as a "printer" it has no proprietary rights to the copy righted stories, characters and created ideas embodied in the comic books. However, this contention misses the mark. World Color manufactures finished comic books which until delivery and transfer of title belong to World Color and not the

publisher. The publisher has no ownership rights, that is, the right to delivery and to possession, in the comic books until there is payment. This is distinguishable from ownership of the *copyright* embodied in those magazines. *Platt & Munk Company v. Republic Graphics, Inc.*, 315 F.2d 847, 854 (2d Cir. 1963). This distinction is expressly codified in the copyright laws: "Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object . . . ." 17 U.S.C. Section 202 (1982).

World Color also makes an argument that because it is not a publisher, but merely a "printer," it cannot be subject to the Robinson-Patman Act. It does not matter that World Color does not also publish comic books. Defendants who both print and publish have been held subject to the Robinson-Patman Act. *Morning Pioneer, Inc. v. Bismark Tribune Company*, 493 F.2d at 389 n. 11. But defendants who merely *print to a customer's specifications* also have been held subject to the Act. In *In re Christmas Club*, 25 F.T.C. 1116 (1937), Christmas Club supplied printed passbooks, account books, and advertising literature to the specifications of individual commercial bank customers. 25 F.T.C. at 1123. Christmas Club printed some of its materials itself; others were produced by independent contractors who shipped directly to the customer banks. 25 F.T.C. at 1125. Because Christmas Club was engaged in producing and selling printed material made to the specifications of its customers, the Federal Trade Commission held that activity to be within the Robinson-Patman Act. 25 F.T.C. at 1127.

## CONCLUSION

This magistrate concludes as a matter of law and after careful review of the pleadings, briefs and arguments, based upon the undisputed facts, that there was a sale of a com-

modity under the Robinson-Patman Act, and, therefore, defendants' motions should be DENIED.[1]

Counsel are given ten (10) days from the date hereof, unless otherwise extended by the Court to file exceptions to said Report and Recommendations with the Honorable Nicholas J. Bua.

Respectfully submitted,

/s/ CARL B. SUSSMAN
United States Magistrate

Dated: October 9, 1984

cc: (w/o encls.)

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[1] As the court has concluded the Robinson-Patman claims are viable, the defendants' contention that the dependent Sherman Act and state trade claims must fail need not be considered.

# APPENDIX 4

[Dated September 18, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 1828

FIRST COMICS, INC.,

Plaintiff,

v.

WORLD COLOR PRESS, INC.,

Defendants.

## MEMORANDUM OPINION

First Comics, Inc. ("First"), a publisher and creator of comic books, brings suit against World Color Press, Inc. ("World"), a printer. First claims that World engaged in discriminatory pricing—i.e., that World charged First more for printing comic books than it did others—even though World assured First that the fees were the same.

First alleges violations of the Robinson-Patman Act, 15 U.S.C. § 13; the Clayton Act, 15 U.S.C. § 15; the Illinois Uniform Deceptive Trade Practices Act ("DTPA"), Ill. Rev. Stat. ch. 121½ ¶¶ 311-17 (Supp. 1987); and the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act" or "CFA"), Ill. Rev. Stat. ch. 121½ ¶¶ 261-272 (Supp. 1987); and claims that World committed common law fraud. In a counterclaim, World seeks to recover printing fees, prepaid freight, and postage charges it says First never paid.

Before the court are World's motions for partial summary judgment on the Robinson-Patman and state stat-

utory claims, and on the counterclaim. Jurisdiction is pursuant to 28 U.S.C. § 1337 and principles of pendent jurisdiction.

## DISCUSSION [1]

### 1. *The Robinson-Patman Act*

The Robinson-Patman Act prohibits price discrimination between different purchasers of commodities of like grade and quality where the effect is anti-competitive. 15 U.S.C. § 13(a). World advances three arguments in support of its motion for summary judgment on this claim: (1) that the Robinson-Patman Act requires a sale to take place, and that it could not have sold the goods in question because it did not have title to them; (2) that the goods are not of like grade and quality; and (3) that the transactions at issue are not comparable. Each of these contentions is without merit.[2]

World's first argument is deceptively simple but totally erroneous. Relying on Section 106(3) of the Copyright Act, 17 U.S.C. § 106(3), which gives the copyright owner the exclusive right to distribute copies of the copyrighted work, World claims that it could not have sold the goods in question because it did not have title to them. Yet nowhere does World assert that any sale illegal under the Copyright Act is *ipso facto* not a sale for purposes of the antitrust laws. It is undisputed that certain sales took place, and the Copyright Act specifically provides that it does not limit remedies available under any other federal statute. *See* 17 U.S.C. § 301(d).

Moreover, World underestimates the relevance of 17 U.S.C. § 202, which distinguishes the ownership of a copy-

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[1] Since these motions request partial summary judgment, all factual inferences are drawn in favor of the non-moving party.

[2] The court does not address the question of whether World sold services or commodities to First, as this issue has not been presented by the parties.

right from the ownership of the material object in which the copyrighted work is embodied. While First may have a copyright in the comic strips as expressions, it does not have a proprietary right in the comic books. Judge Bua and Magistrate Sussman explicitly so held. *See* Report and Recommendation of Magistrate Carl B. Sussman at 9-10, Memorandum and Order of Judge Bua at 2-3. World's contention that the Copyright Act protects expressions rather than ideas, citing 17 U.S.C. § 102(b), is accurate but unpersuasive: in this case, the crucial distinction lies in the difference between the expressions and the comic books, not the expressions and the ideas.

World's second argument, that the goods are not of like grade and quality, is also weak. World attempts to distinguish the comic books at issue based on the authors, characters, stories, and illustrations. But World does not suggest that a different author or character increases the production cost of the comic book. World provided First and others with 32 four-color interior page letterpress comic books with 4 four-color covers, all of the same size and paper stock. World does not argue that First requested bigger or more pages or a different kind of paper. Accordingly, First's citations to cases involving goods manufactured according to producer specifications are irrelevant. *See, e.g., Ambrook Enterprises v. Time, Inc.*, 612 F.2d 604 (2d Cir. 1979); *Wire Mesh Products, Inc. v. Wire Belting Association*, 520 F. Supp. 1004 (E.D. Pa. 1981).

Furthermore, the very test articulated by World convinces this court that the products involved may be of like grade and quality. World states that the relevant inquiry is whether *consumers* perceive the goods as comparable. In this case, the consumers are comic book publishers like First, not children buying comic books at newsstands. If First and its competitors perceive the type and quality of comic books described above as identical, this court must do the same. Summary judgment there-

fore is denied because World has not shown as a matter of law that the goods in question are dissimilar.[3]

World's final argument under Count I can be summarily rejected. World argues that the transactions First compares in order to demonstrate price discrimination are too different for purposes of applying the Robinson-Patman Act. Specifically, it claims that its contracts with Marvel Comics ("Marvel") are long-term agreements with automatic yearly renewals, while its contracts with First were merely individual orders made on a one-shot basis. World never demonstrates, however, that long-term contracts are *per se* unlike spot orders under the Act. All the act requires is that the transactions be made at approximately the same period of time, *see Texas Gulf Sulphur Company v. J.R. Simplot Company*, 418 F.2d 793, 806-07 (9th Cir. 1969), and World itself admits that it could have renegotiated its contract with Marvel during the time it was doing business with First. Moreover, at least one court has expressly declined to grant summary judgment in these circumstances because of a lack of authority on the subject. *See SDI Reading Concrete, Inc. v. Hilltop Basic Resources, Inc.*, 576 F. Supp. 525, 532 (S.D. Ohio 1983).[4]

Accordingly, World's motion for partial summary judgment on the Robinson-Patman Act claim is denied on all grounds.

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[3] World has not argued that any differences in prices charged to First and to others is due to a difference in the volume of comic books produced. Accordingly, the court expresses no opinion on this matter.

[4] *Dealers Wholesale Supply v. Pacific Steel and Supply*, 1984-2 Trade Cas. (CCH) ¶ 66,109 (N.D. Cal. 1984), which held that sales separated by over five months were insufficiently alike, is distinguishable. The court noted the lack of evidence on the issue and stated that the evidence that was submitted was "badly flawed." In addition, the court did not rule that sales separated by more than five months were *per se* incomparable. *Id.* at 66,204.

2. *The State Statutory Claims.*

First's claims under the Illinois Uniform Deceptive Trade Practices Act, *supra,* and the Illinois Consumer Fraud Act, *supra,* are set out in Count III of the complaint. World seeks summary judgment on the grounds that (1) the DTPA provides only for injunctive relief and First's complaint seeks damages; and (2) First does not have standing to sue under the CFA because it cannot show that consumers were injured by World's alleged acts.

Rule 54(c) of the Federal Rules of Civil Procedure states, with one exception not relevant here, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." *See also,* 2A *Moore's Federal Practice,* ¶ 8.14 at 8-85 (1987). In this case, World cannot even claim that it would be surprised by an award of injunctive relief, because whenever a practice unlawful under § 2 of the DTPA is used in the conduct of trade or commerce, there is a violation of the CFA as well. *See* Ill. Rev. Stat. ch. 121½, ¶ 262 (Supp. 1987). Thus, World's motion for summary judgment under the DTPA is denied.

World's argument on the CFA claim comprises three parts: first it contends that First must be a consumer in order to sue; second and alternatively, if First is not a consumer, it must at least show consumer injury; and third, consumer injury should not be presumed. The court will address those contentions in the order given.

The Consumer Fraud Act clearly extends to businesses; First need not be an individual to bring a claim. *Jay's Foods, Inc. v. Frito-Lay, Inc.,* 1987-2 Trade Cas. (CCH) ¶ 67,651 at 58,317 (N.D. Ill. 1987). The question of whether First has to demonstrate consumer injury is more difficult, since Illinois courts have disagreed on the issue. *Id.* This court finds, however, that the consumer injury requirement usually is applied where the suit involves a private dispute between businessmen. *See, id.* and cases cited

therein. First attempts to argue that this is more than a private dispute because of the antitrust claims, but its own pleadings demonstrate that the alleged CFA violation is premised on common law fraud rather than federal antitrust statutes. *See* complaint, ¶¶ 167-68; plaintiff's proposed jury instruction No. 36. Even if the antitrust allegations were stated under the CFA claim, First would have trouble, for this is still a suit between businessmen. *Fitzgerald v. Chicago Title & Trust Company,* 46 Ill. App. 3d 526 (1st Dist. 1977), *aff'd,* 72 Ill.2d 179 (1978), does not compel a different result because the court in that case did not discuss the public injury requirement. It did not need to do so because the suit was brought by a class of individual plaintiffs. *Id.* at 526-27.

First has not pleaded a consumer injury, nor has it submitted any evidence of one. The court refuses to presume a consumer fraud injury because it would be contrary to Illinois law and because First has not submitted any evidence suggesting that World's allegedly higher prices were in fact passed on to consumers at the newsstand. *See Jay's Foods, supra* at 58,318 (court refused to presume consumer injury based on allegedly improper allocation of shelf space between competing suppliers). Accordingly, World's motion for partial summary judgment on the Consumer Fraud Act Claim is granted.[5]

3. *World's Counterclaim.*

World's motion for summary judgment on its counterclaim is denied. World seeks to recover printing fees and prepaid freight and postage charges it claims First owes. First concedes that it was billed for the money, that it has not paid those bills, and that it customarily paid freight and postage charges and printing fees. *See* Plain-

[5] The parties have not addressed whether the Deceptive Trade practices Act claim can survive dismissal of the Consumer Fraud Act claim, thus the court expreses no opinion on the issue at this time.

tiff's Answer to Counterclaims of World Color Press, Inc., ¶¶ 5-8. First claims, however, that the bills are incorrect and that the money is not due and owing. While a party opposing a motion for summary judgment ordinarily must go beyond his pleadings, *see Celotex Corporation v. Catrett*, 106 S. Ct. 2548, 2553 (1986), we note that the burden on this counterclaim is on World, the movant. Accordingly, the court finds an issue of material fact and does not address the sufficiency of First's defenses to the counterclaim.

## CONCLUSION

Defendant's motion for partial summary judgment is denied as to the Robinson-Patman Act claim, the Illinois Uniform Deceptive Trade Practices Act claim, and the counterclaim. The motion is granted as to the claim under the Illinois Consumer Fraud and Deceptive Business Practices Act.

ENTER:

/s/ BRIAN BARNETT DUFF
Brian Barnett Duff, Judge
United States District Court

DATE: September 18, 1987

# APPENDIX 5

[Dated October 16, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

## JUDGMENT IN A CIVIL CASE

First Comics, Inc.

v. Case Number: 84 C 1828

World Color Press, Inc.

☒ Jury Verdict. This Action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is entered as follows:

(1) for the defendant and against the plaintiff on plaintiff's Robinson-Patman claim;

(2) for the plaintiff and against the defendant on plaintiff's fraud claim and assess the plaintiff's actual damages in the sum of $407,072.00;

(3) for the defendant and against plaintiff on plaintiff's Illinois Consumer Fraud Act claim;

(4) for the defendant and against plaintiff on plaintiff's promissory estoppel claim;

(5) against the defendant and for the plaintiff on defendant's counterclaim.

October 16, 1987
*Date*

H. STUART CUNNINGHAM
*Clerk*

/s/ CLAUDIA M. FLAGG
*(By) Deputy Clerk*
Claudia M. Flagg

# APPENDIX 6

[Dated October 28, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 1828

FIRST COMICS INC.,

Plaintiff,

v.

WORLD COLOR PRESS,

Defendant.

## MEMORANDUM OPINION

This suit between First Comics, Inc. ("First") and World Color Press, Inc. ("World") is based on the Robinson-Patman Act, 15 U.S.C. § 13(a), and pendent state claims. Before the court are World's motion for a directed verdict and First's cross-motions for certain directed findings.

At conferences on October 14-15, 1987, this court denied World's motion but granted some of the directed findings that First requested. This opinion will supplement those oral rulings.

I. *Motion for a Directed Finding on the Dominant Nature of the Transaction.*

By its terms, the Robinson-Patman Act applies only to sales of "commodities." 15 U.S.C. § 13(a). Commodities, at least in this circuit, are "goods, wares, merchandise, machinery and supplies . . . ." *Columbia Broadcasting Sys-*

*tem, Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375, 378 (7th Cir. 1961). When a transaction involves both the transfer of a commodity and the performance of a service, courts have looked to the "dominant nature" of the transaction in order to determine whether the Robinson-Patman Act applies. *Aviation Specialties, Inc. v. United Technologies Corporation*, 568 F.2d 1186, 1191 (5th Cir. 1978); *Baum v. Investors Diversified Services, Inc.*, 409 F.2d 872, 875 (7th Cir. 1969).

In this case, it is undisputed that First develops an illustrated story and sends it to a company that produces color separations from which the comic books will be printed. World then receives the color separations and manufactures comic books, supplying ink, paper, staples, and other physical materials as needed. At that point, and at no time prior thereto, a saleable item is produced.[1]

The majority of Robinson-Patman cases dealing with the service versus commodity issue have treated it as a matter of law. *See, e.g., Aviation Specialties, supra*; *Baum, supra*; *Columbia Broadcasting, supra*; *but see May Department Store v. Graphic Process Company*, 637 F.2d 1211 (9th Cir. 1980). It is helpful to look to those cases to determine the dominant nature of the transaction between First and World.

Where the tangible good produced in a hybrid transaction is merely incidental to the services performed, courts have held that the dominant nature of the exchange was for a service. *See Freeman v. Chicago Title & Trust Company*, 505 F.2d 527, 531 (7th Cir. 1974) (issuance of title insurance certificate); *Advance Office Systems, Inc. v. Accounting Systems Company, Inc.*, 442 F. Supp. 418, 421

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[1] In December, 1984, Judge Bua reversed Magistrate Sussman's ruling that a newspaper was a commodity as a matter of law, finding that there were factual issues involved. It is appropriate to re-examine that ruling, however, because three years' worth of discovery has transpired since then. *See Redfield v. Continental Casualty Corp.*, 818 F.2d 596, 597 (7th Cir. 1987) (law of the case is a discretionary doctrine that may be modified as a matter of common sense).

(D.S.C. 1977) (preparation of billing statements). Conversely, a number of older decisions, without applying the dominant nature test, have held that printers such as World are subject to the Robinson-Patman Act. *See Reid v. Harper & Brothers*, 235 F.2d 420 (2d Cir. 1956); *In the Matter of Doubleday and Company*, 52 F.T.C. 169 (1955). The Eighth Circuit has followed the dominant nature test and ruled that a newspaper is a commodity, but only in dicta. *The Morning Pioneer, Inc. v. The Bismark Tribune Company*, 493 F.2d 383, 389 n. 11 (8th Cir. 1974).

Even without relying on the latter cases, this court is comfortable in ruling that newspapers are commodities. The comic books generated as a result of the transactions between First and World are anything but incidental: they are the very point of the exchanges. Moreover, instead of merely working with the raw expressions provided by First, World adds tangible materials to those expressions such that there is a value added to the item in the production chain. Finally, once World contributes materials and labor to the expressions, the production chain ends and a consumable item results. *Compare May Department Store, supra* (defendant created an input from which the consumable item, a newspaper advertisement, was produced).

World attempts to argue that a two-page contract between it and First, and the testimony of several witnesses, show that there are disputed issues of fact on this questions. At least one court has already opined, however, that the parties' beliefs as to whether a transaction involves a commodity or a service are not controlling. *See Wise & Company v. Rand McNally*, 195 F. Supp. 621, 626 n. 5 (S.D.N.Y. 1961). And a motion for summary judgment (and likewise, for a directed verdict) cannot be defeated by any factual issue, no matter how small. *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 106 S. Ct. 2505, 2510 (1986).

*General Shale Products Corporation v. Struck Construction Company*, 132 F.2d 425 (6th Cir. 1942), is not to the contrary. In that decision, the Sixth Circuit ruled that

an agreement to build housing facilities was a contract for services rather than the sale of a commodity. But a house is not a commodity, it is a piece of real estate. It does not "move" in commerce. *General Shale* therefore is not controlling.

II. *Motion for a Directed Finding on the Like Grade and Quality Issue.*

In order to invoke the Robinson-Patman Act, a plaintiff also must show that the commodities at issue are so alike that their prices should be the same. In legal terms, the commodities must be "of like grade and quality." 15 U.S.C. § 13(a). The parties agree that the consumers' perspective controls in determining whether this test is met.

As this court has already explained at length in a prior opinion, *see First Comics, Inc. v. World Color Press, Inc.*, No. 84-1828, Memorandum Opinion at 3-4 (Sept. 18, 1987), the consumers for purposes of this issue are comic book publishers like First. They pay for 32 four-color interior page letterpress comic books. World's argument, in essence, is that the comic books are different because they sell for different prices at the newsstands. But such a distinction between standard and premium versions of the same item has been outlawed by the court in *Checker Motors Corporation v. Chrysler Corporation*, 283 F. Supp. 876, 889 (S.D.N.Y. 1968), *aff'd on other grounds*, 405 F.2d 319 (2d Cir. 1969). It also would eviscerate the very purpose of the Robinson-Patman Act.

Defendant's citation of *The Morning Pioneer, Inc. v. The Bismarck Tribune Co.*, 342 F. Supp. 1138 (D.N.D. 1972), *aff'd*, 493 F.2d 383 (8th Cir. 1974), is unpersuasive. In that case, the court distinguished between newspapers that were delivered at different times, contained varying amounts of local news, and had advertisements that pertained to events in particular areas, *id.* at 1141, because those variables affected the value of the newspaper to the consumer. Here the values of the comic books provided

to First and its competitors, at least insofar as they contain work performed by World, are identical. It makes no difference for the purposes of this evaluation that the comic books contain copyrighted materials which can be sold only by the copyright holder. *See* Memorandum Opinion of Sept. 18, 1987, *supra* at 2-3.

The parties have not raised any disputed issues of material fact. Accordingly, a directed finding is granted in favor of First on the issue of like grade and quality.

III. *Motion for a Directed Finding on the Issue of Competitive Injury.*

First also requested this court to hold, as a matter of law, that World's actions caused an injury to competition. In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435-36 (1983), the Supreme Court held that injury to competition could be inferred from proof of a substantial, sustained price discrimination, but that this inference could be overcome in the absence of direct evidence that sales had been displaced. *See also, Richard Short Oil Co., Inc. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Foremost Pro Color, Inc. v. Eastman Kodak Company*, 703 F.2d 534, 548 (9th Cir. 1983); *The American Oil Company v. Federal Trade Commission*, 325 F.2d 101, 104 (7th Cir. 1963). The parties agree that plaintiff has not submitted any such direct evidence in this case.

The evidence at trial showed that over a period of approximately eighteen months, World charged one price to First and other small publishers, and a lower price to the larger, more established companies. The amount of this price difference, however, is contested. First claims it has shown price differences of at least 50%, citing Mr. Obadiah's testimony, while World insists that the differences may be as little as one cent per copy, or less than 10%, by relying on the testimony of Dr. Pisarkiewicz. Even if a substantial, sustained price difference was shown, World has demonstrated that those differences may not have

been reflected in prices charged at the retail level, and hence, may have had no effect on competition whatsoever. *See* testimony of Mr. Geppi. Accordingly, First's motion for a directed finding on this issue must be denied.

## CONCLUSION

World's motion for a directed verdict on First's complaint is denied. First's motions for directed findings on the dominant nature of the transaction and on the like grade and quality issues are granted. First's motion for a directed finding of competitive injury is denied.

ENTER:

/s/ BRIAN BARNETT DUFF
Brian Barnett Duff, Judge
United States District Court

DATE: October 28, 1987

# APPENDIX 7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 84 C 1828 Date: August 2, 1988

Name of Assigned Judge: Brian Barnett Duff

Case Title: First Comics, Inc. v. World Color Press, Inc.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

This case meets the high standard necessary for granting judgment n.o.v., for there is no competent evidence on which plaintiff's consequential damages award can be based. World Color's motion for judgment n.o.v. is granted in part and First Comics' damages recovery is reduced in the amount of $236,705.00. The remainder of World Color's motion is denied.

* * * * *

(12) ☒ (For further detail see ☒ order attached to the original minute order form.)

* * * * *

# APPENDIX 8

**15 U.S.C. § 13**

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein shall contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions

and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services of facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandies, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or

through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

**15 U.S.C. § 15(a)**

**(a) Amount of recovery; prejudgment interest**

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date

of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156; Dec. 29, 1982, Pub.L. 97-393, 96 Stat. 1964.)

# APPENDIX 9

17 U.S.C. Sections 106, 109, 202, and 301 provide as follows:

**§ 106. Exclusive rights in copyrighted works**

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

**§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord**

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b)(1) Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording and in the musical works embodied therein, the owner of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.

(2) Nothing in this subsection shall affect any provision of the antitrust laws. For purposes of the preceding sentence, "antitrust laws" has the meaning given that term in the first section of the Clayton Act and includes section 5 of the Federal Trade Commission Act to the extent that section relates to unfair methods of competition.

(3) Any person who distributes a phonorecord in violation of clause (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509. Such violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.

(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(d) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

### § 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

### § 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

No. 89-970



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

FIRST COMICS, INC.,
*Petitioner,*

vs.

WORLD COLOR PRESS, INC.,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

Petitioner's statement of "Questions Presented for Review" violates the dictate of Supreme Court Rule 21.1(a) that questions should be expressed in the terms and circumstances of the case. No portion of the Seventh Circuit's opinion can be construed as holding that comic books are not "commodities" for Robinson-Patman Act purposes. To the contrary, the Seventh Circuit explicitly observed that the physical books themselves are commodities, and held that, based upon the facts of this case, the act of printing the books for a publisher entails the provision of a "service" to the publisher by the printer.

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# No. 89-970

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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FIRST COMICS, INC.,
*Petitioner,*

vs.

WORLD COLOR PRESS, INC.,
*Respondent.*[1]

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent World Color Press, Inc. respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision in this case of the United States Court of Appeals for the Seventh Circuit.

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[1] In conformity with Supreme Court Rule 28.1, respondent states that it is a wholly-owned subsidiary of Printing Holdings, L.P., a Delaware limited partnership; that it has no subsidiaries except ones wholly owned by it; and that its affiliate is Commercial Printing Holding Company.

## STATEMENT OF THE CASE

**Background.** In February, 1984, First Comics, Inc. ("FC") filed the instant action against World Color Press, Inc. ("WCP") alleging, in relevant part, violations of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a) (the "Act").

FC is a Chicago-based publisher of comic books. As a publisher, FC and its authors and artists produce the artwork and stories that comprise the comic books which it publishes. Further, as the publisher, FC owns the federal copyright rights to publish, copy, distribute and sell its comic books.

WCP is a printer of comic books, magazines and other periodicals. It is *not* a publisher. As a printer, when dealing with FC and other publishers, WCP provides a service in which it supplies paper and ink and then prints the publisher's artwork and stories, using color separation screens owned and provided by the publisher. WCP does not hold the federal copyright rights of publication and sale of the printed works, which at all times remain in the copyright-owning publishers throughout the printing stage of production.

Comic books, like other books, are distinguished from one another by several features which consumers and publisher customers view as significant. These include differences as to the characters, artwork, story, artist and author for each book, and copyright restrictions that would prevent one publisher from legally selling copyrighted works of another publisher. Because of these differences, comic books printed for one publisher (be it FC, Marvel Comics, DC Comics or anyone else) are not substitutable to fill the print order of another publisher. Rather, each publisher is interested only in those books bearing its own characters, artwork, stories and copyrights. (See FC App. 8-9).

**FC's Own Pricing Practices.** The Robinson-Patman claim at issue in this case concerned acknowledged differences in the

prices charged by WCP to FC versus WCP's largest volume print customers, in particular, Marvel Comics and DC Comics. FC was charged an average of 11.1 cents per copy, or 4.3 cents more per copy than Marvel and DC. FC did not, however, charge its wholesale customers the same added 4.3 cents. Instead, during the time period relevant to the case, FC charged its wholesale customers over *ten* cents more per copy than did its competitors Marvel and DC. (i.e., more than *twice* the amount of the alleged cost discrimination). Moreover, FC set a retail list price on its comic books of $1.00, when Marvel, DC and other comic book publishers had list prices of only 60 cents to 75 cents per copy, for a price spread at the consumer level of approximately ten times (40 cents) the amount of the alleged printing cost discrimination (4.3 cents). Despite the pricing behavior on FC's own part, evidence was presented that FC remained profitable and that the market remained competitive. (See FC App. 14-15, 48-49).

**Jury Verdict and Appeal.** Before sending the case to the jury, the trial judge directed findings that as a matter of law: (1) WCP was engaged in the sale of commodities and not services for Robinson-Patman Act purposes, and (2) the commodities (finished comic books) were of like grade and quality for purposes of the Act, notwithstanding their undisputed differences in story, artwork, author and characters. Despite these directed findings in favor of FC, the jury found for WCP, in light of FC's own pricing behavior and other evidence going to the issues of competitive effect and causation.

FC appealed the jury verdict in WCP's favor to the Seventh Circuit, and WCP cross-appealed the trial court's directed findings on the issues of "commodity" and "like grade and quality." On appeal, the Seventh Circuit reversed the lower court's directed findings and held that, as a matter of law, a printer such as WCP that prints for a publisher such as FC is engaged in the service of printing publications that are not of

like grade and quality for Robinson-Patman purposes.[2] The jury verdict in WCP's favor was, thus, left intact on the jurisdictional ground that FC's Robinson-Patman claim should not have been sent to the jury in the first place.

[2] The decision of the Seventh Circuit appears at 884 F.2d 1033.

## REASONS FOR DENYING THE WRIT

### I.

### THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT BOTH WITH ESTABLISHED CASELAW GOVERNING THE DISTINCTION BETWEEN A "COMMODITY" AND A "SERVICE" AND IS WITH OTHER CIRCUIT CASES

FC greatly distorts the actual holding of the Seventh Circuit in this case when it argues that the Circuit Court held, as a matter of law, that physical comic books are "not commodities" (FC Brief i, 11-13). This incorrect characterization of the Circuit Court's ruling is the foundation of FC's argument as to why the writ should be granted on the commodity-versus-service issue. Because the foundation is faulty, the petition for the writ should be denied.

In fact, the Seventh Circuit did *not* hold that the physical comic books produced by WCP are not commodities. The Circuit Court specifically observed that "[t]he parties do not dispute that comic books are commodities within the meaning of the Act" (FC App. 5). What the court *did* hold was that the "dominant nature of the transaction" between WCP and its publisher customers was one for printing services consisting of "transpos[ing] images from one surface to another" (FC App. 7). As observed by the court:

> "[W]hat was First Comics buying? It was not buying the comics themselves — First Comics' artists and authors produce the comics. And it was not merely buying the paper and ink. The tangible items provided by World Color Press, the paper, ink and staples, are uniformly fungible and not subject to significant price differentials among printers. Rather, as First Comics argues in its brief, World Color Press is 'the only [printer] using the less costly "letterpress" method' (Br. 3) — and that is what First Comics

was purchasing, the letterpress method and process of transposing and multiplying images. As explained in Rowe, *supra,* at 60-61, price quotations fusing physical elements with dominant intangible factors do not beget price discrimination within the Act.

The singularly most important ingredient, the color separations, were provided by First Comics. Defendant was in essence multiplying what First Comics already produced. Borrowing from *Advanced Office Systems v. Accounting Systems Co.*, 442 F.Supp. 418, 423 (D.S.C. 1977) (preparation of billing statements is a service), at the printing stage the comic books lack real value to any entity other than First Comics. World Color Press cannot sell the finished comic books to any other buyer since First Comics holds the copyright, nor would any of World Color Press' other clients be interested in finished comic books bearing a First Comics story — rather each client wants only the printed version of its own comic book." (FC App. 8).

The decision of the Seventh Circuit is perfectly consistent with those of other Circuit Courts. When confronted with the issue of whether a hybrid transaction involving a mix of services and physical materials should be treated as a "commodity" or a "service" sale for Robinson-Patman purposes, other courts have applied the same test utilized by the Seventh Circuit; they have inquired as to the "dominant nature of the transaction" in light of the facts and circumstances relevant to the particular case. (See, e.g., the cases cited at page 8, *infra.*)

The book and other publication cases cited by FC are not to the contrary. Each of them involved sales of books, newspapers or other printed publications *by a publisher* engaged in the sale of *identical* already-printed publications to different wholesale or retail customers. *Reid v. Harper & Bros.*, 235 F.2d 420 (2nd Cir.), *cert. denied,* 352 U.S. 952 (1956) (suit by book wholesaler

against its publisher supplier); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, (8th Cir.), *cert. denied,* 419 U.S. 836 (1974) (suit by a competitor against a newspaper publisher); *In the Matter of Archie Comic Publications,* 61 F.T.C. 100 (1962) (non-litigated consent order involving sales to wholesale and retail customers by a publisher of comic books); *In the Matter of National Comics Publications, Inc.,* 57 F.T.C. 69 (1959) (non-litigated consent order involving sales to retail customers by a publisher of comic books); *In the Matter of Christmas Club,* 25 F.T.C. 1116, 1125 (1937) (FTC action against a publisher of account books, passbooks and advertising literature sold by it to banks and bank depositors);[3] *In the Matter of American News Co.,* 58 F.T.C. 10 (1961) (FTC action against a distributor for inducing price discriminations by publishers in the sale of books, magazines and comic books). As observed by the Seventh Circuit:

> "[The Court's ruling] does not conflict with earlier decisions holding that newspapers and books are commodities, because in those cases the defendants were the publishers. There the publishers were sued for discriminatory pricing schemes for identical books and identical newspapers sold to different retailers and consumers. The publishers were indeed selling commodities, the predominant nature of the transactions was between the publishers and their customers and involved sales of identical products. Here the transaction was for printing, a service which made possible the production of commodities for future sales by plaintiff. The Robinson-Patman Act was therefore inapplicable." (FC App. 9).

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[3] In its Brief, FC erroneously characterized this case as not involving a publisher. FC Brief 12-13. Actually, the respondent in *Christmas Club,* like FC, was a publisher that owned all copyright rights in the subject works and had them printed by other firms (like WCP) to its specifications for sale by it to banks and consumers. 25 F.T.C. at 1125.

Equally misplaced is FC's unsupported assertion that services outside the Robinson-Patman Act "do not end with a tangible, self-contained object" (FC Brief 14). The fact that a service happens to contribute to the creation of a tangible object does not *ipso facto* mean that the business providing the service is engaged in the sale of the finished object. Rather, the determination must be made based upon an analysis of the facts of each case to ascertain the "dominant nature of the transaction." See, *e.g.*, *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978) (applying the dominant nature test to hold that a company that repaired airplane engines was a service provider, even though its service included parts as well as labor and resulted in a finished tangible object); *General Shale Products Corp. v. Struck Construction Co.*, 132 F.2d 425, 428 (6th Cir. 1942) (applying the dominant nature test to hold that a company that constructed buildings was a service provider, even though its service included bricks and other materials as well as labor and resulted in finished buildings); *SCM Corp. v. Xerox Corp.*, 394 F.Supp. 384 (D. Conn. 1975) (applying the dominant nature test to hold that a xerography copying business was a service, even though it resulted in finished photocopies of printed publications).

In affirming the jury verdict for WCP, the Seventh Circuit applied precisely the same standard, i.e., what is the "dominant nature of the transaction." Moreover, it did so in a way that achieved a realistic and workable distinction between the case actually before it (involving a mere "printer" of books that brings to the transaction paper, ink and its printing service) and the "publisher" cases on which FC relies (in which the defen-

dant is a publisher that sells already-printed books created by it and over which it holds all federal rights of copyright).[4]

## II.

## THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT BOTH WITH ESTABLISHED CASELAW GOVERNING DETERMINATION OF WHETHER ITEMS ARE "OF LIKE GRADE AND QUALITY" FOR ROBINSON-PATMAN ACT PURPOSES AND WITH OTHER CIRCUIT CASES

Having argued that WCP is a seller of finished comic books, FC engages in intellectual back pedalling when it comes to the issue of "like grade and quality." Here, FC argues that WCP is *not* a seller of finished comic books. Rather, WCP is somehow a seller of finished publications for which no consideration whatever is to be given to story, artwork, author, artist or publisher. (FC Brief 21-24). So stripped, WCP becomes a seller of blank pieces of paper bound and stapled together.

As observed by the Seventh Circuit, this is most certainly not what WCP's publisher customers expected to get. Rather, each customer expected "the printed version of its own comic book," (FC App. 8) i.e., a fully printed comic book that the publisher could then sell to its readers.

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[4] FC's arguments (FC Brief 18-21) that the copyrighted nature of the works in question should somehow simply be disregarded is absurd on its face. The fact that WCP, as a printer, does not have the legal right under federal copyright law to "sell" a finished comic book to any publisher except the one who ordered it is a powerful factor bearing upon the true nature of the transaction. Copyright restrictions are similarly an important factor affecting publisher-customer perceptions as to the substitutability of a book printed for one publisher to meet the needs of a different publisher, i.e., the degree of "like grade and quality" between the books. The Seventh Circuit properly considered copyright restrictions in its analysis, just as it considered other relevant factors bearing upon the dominant nature of the transaction and customer perceptions of what was actually being purchased (FC App. 8-9).

The cases relied upon by FC are not to the contrary (FC Brief 22-23). In each of them, the defendant was either selling physically identical goods or goods so closely identical as to constitute "like grade and quality" substitutes where customers were free to make such a substitution if they wished. *Joseph A. Kaplan & Sons, Inc.*, 63 F.T.C. 1308, 1347-48 (1963), *mod. on other grounds*, 347 F.2d 785 (D.C. Cir. 1963) (minor pattern differences as to otherwise identical shower curtains, where customers were free to substitute one curtain for another); *Advanced Office Systems v. Accounting Systems Co.*, 442 F.Supp. 418, 423 (D.S.C. 1977) (dictum that T-shirts with different patterns might still be of like grade and quality, where freely substitutable by the defendant's customers); *FTC v. Borden Co.*, 383 U.S. 637 (1966) (identical milk products); *Bruce's Juices, Inc. v. American Can Co., 87 F.Supp. 985 (S.D. Fla. 1949), aff'd,* 187 F.2d 919 (5th Cir.), *cert. denied,* 342 U.S. 875 (1951) (identical cans); *In the Matter of General Foods Corp.*, 52 F.T.C. 798, 817 (1956) (slight variations in blends and roastings of coffee products); *In the Matter of Doubleday & Co., Inc.*, 52 F.T.C. 169, 192-93 (1955) (in relevant part, not a Robinson-Patman Act case, but a resale price fixing case).

The instant case could hardly be more different. A FC comic book is not distinguished from a Marvel or a DC comic book by minor "pattern" differences where WCP's publisher customers are free to substitute one book for another. Undisputed distinctions as to characters, story content, artwork, artist, author, and copyright rights of distribution and sale mean that the finished comic books printed for one publisher "are of no use to any other publisher" (FC App. 9).

Also misplaced is FC's argument that the Seventh Circuit erroneously applied an "ultimate consumer" test, rather than measuring like grade and quality in terms of WCP's own customers: namely, WCP's publisher customers such as FC and Marvel (FC Brief 23-24). The Circuit Court *did* look to the needs and perceptions of WCP's publisher customers, and con-

cluded that "[s]ince the finished First Comics comic books are of no use to any other publisher," books printed for FC were not of "like grade and quality" with books printed for other publisher customers. (FC App. 8-9, n.6).

The Seventh Circuit's decision, thus, did exactly what other cases have done when faced with the issue of product like grade and quality; it focused upon the physical similarities or dissimilarities of the goods being compared and asked how the dissimilarities, if any, affected customer purchasing behavior. This is not, in the words of FC, a "sweeping, wholesale excision from the Robinson-Patman Act"; it is a straight-forward application of established Robinson-Patman caselaw.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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